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CORPORATE HEADQUARTERS
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SOUTHWEST MARINE INC.

John A. Hinton
Regional Administrator
California Environmental Protection Agency
Department of Toxic Substance Control
Office of External Affairs
245 W. Broadway, Suite 425
Long Beach, CA 90802-4444

April 12, 994

Dear Mr. Hinton:

This letter is to express my appreciation to for meeting with the members of the San Diego Industrial Environmental Association ("IEA") to discuss the correction of some of our problems with the Department of Toxic Substance Control. Southwest Marine ("SWM") recognizes that even the best administered programs will develop glitches from time to time that require the focused efforts of both the agency and the industry to correct. Our meeting to discuss these issues in an open forum speaks highly of CalEPA's commitment to resolve these concerns.

At the meeting I specifically raised issues concerning the U.S. Navy's refusal to accept generator status for hazardous waste generated from their vessels and the Division of Toxic Substance Control opposition to SWM's appeal to the State Board of Equalization ("SBE") for refund of taxes paid by SWM for hazardous waste generated by the U.S. Navy. I have provided you with a summary of both issues below:

Navy Generated Hazardous Waste

Problem: The U.S. Navy refuses to accept "generator" responsibility for the hazardous waste generated from Navy vessels under repair in private contractor's yards. This forces the shipyard to assume all liability and costs, including California hazardous waste taxes and fees, involved in the handling and disposal of the Navy's hazardous waste and circumvents the requirement for "cradle-to-grave" responsibility for generators of hazardous waste.

Background: Since mid-1980, the U.S. Navy has contractually compelled ship yards in California to accept generator status for Navy generated hazardous waste during vessel repair operations. The Navy supports this contract requirement using the logic that only "materials-in-process" exist on a vessel. Therefore, until the material is disposed of by the ship repair contractor it is not a "waste" and therefore not subject to regulation under the California hazardous waste control statutes.

California and other U.S. shipyards have tried repeatedly to get the U.S. EPA to compel the Navy to stop circumventing their legal responsibility. The EPA, which has formally agreed with position of the ship yards, has refused to take enforcement action against the Navy, referring the ship yards to their local EPA Regions for relief. The local regions, including Region 9, have refused to take action, stating they can not act without the U.S EPA's policy guidance. The California Division of Toxic Substance Control (as the Department of Health Services, during the 1980's) also has repeated confirmed to California ship yards that the Navy is legally the generator and must accept generator status. Despite these facts the Navy continues to compel ship yards to dispose of Navy hazardous waste under the contractor's EPA Identification Number by threat of contract default.

Solution: The California Environmental Protection Agency can bring immediate liability and financial relief to the ship repair industry by compelling the Navy to come into compliance with California hazardous waste control laws. The Division of Toxic Substance Control can and should bring enforcement actions against the Navy, if it fails to comply with the law.

Taxes and Fees paid by private Contractors for Navy Generated Hazardous Waste

Problem: California taxes and fees, paid on hazardous waste, are tracked by EPA Identification Numbers through uniform hazardous waste manifests. When the Navy forces private ship yards to assume generator status for Navy generated hazardous waste this causes the contractor to become liable for taxes and fees which should be paid by the Navy.

Background: In late 1989, SWM appealed to the California State Board of Equalization ("SBE") for a re-determination of taxes paid in 1988 on hazardous waste generated by the U.S. Navy. After a delay of almost two years, the SBE staff denied SWM's claim. SWM appealed this decision in an informal hearing before a SBE Hearing Officer and was opposed in our claim by attorneys from the Division of Toxic Substance Control ("DTSC") Fees Unit. The DTSC attorneys claimed SWM was the generator of the hazardous waste, and was responsible for their taxes and fees, despite the fact that on numerous occasions in the past, the Department of the Health Services (the predecessor agency of the Division of Toxic Substance Control) had determined that the Navy was in fact the generator of hazardous waste derived from their vessels.

Solution: The Division of Toxic Substance Control must adopt a uniform and consistent position concerning who is the generator of hazardous waste from vessels undergoing repair in California ship yards. This position must be uniformly implemented by DTSC in both the enforcement and fees units.

I hope this clarifies the issues I raised at our meeting. I will phone you in the next week or so to discuss how SWM and CalEPA can work together to resolve these issues.

Sincerely,

Dana M. Austin

Dana M. Austin
Corporate Manager
Environmental Affairs

Attachments

cc: John D. Dunlap III (List of Attachments only)

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ATTACHMENTS:

Issue 1: U.S. Navy Generated Hazardous Waste

1.1) Letter from Mr. Richard Wilcoron, Chief, Toxic Substance Control Division, California Department of the Health Services, dated ?/28/84, to Mr. M.H. Donley of Commercial Cleaning Corporation, stating the U.S. Navy is the "generator" of hazardous waste (bilge waters) from the operation of their vessels and must assume generator responsibilities.

1.2) Letter from Mr. Harry N. Sneh, Facility Permitting Unit, Toxic Substance Control Division of the California Department of Health Services, dated June 4, 1985, to Mr. Bruce Gair of Southwest Marine, stating the U.S. Navy is the "generator" of hazardous waste (asbestos) generated from repair operations on their vessels.

1.3) Notice of Violation, dated October 31, 1985, issued by the County of San Diego, Department of Health Services, to the U.S. Navy, for failing to manifest asbestos waste generated from repair work performed at Southwest Marine.

1.4) Letter from Mr. David Mulliken, Latham & Watkins, to Mr. Angelo Bellomo, Chief, Southern California Section, Toxic Substance Control Division of the California Department of Health Services, dated January 22, 1996, providing legal analysis U.S. Navy Violations of California Hazardous Waste Control Requirements on behalf of National Steel & Ship Building Company and the Port of San Diego Ship Repair Association.

1.5) Letter from Mr. David Mulliken, Latham & Watkins, to Mr. Angelo Bellomo, Chief, Southern California Section, Toxic Substance Control Division of the California Department of Health Services, dated January 23, 1996, providing executive summary of January 22, 1986 letter to same.

1.6) Letter from Marcia Williams, Director, Office of Solid Waste, U.S. Environmental Protection Agency, dated February 5, 1986, to Vice Admiral Peter J. Rotz, U.S. Coast Guard, stating that as general matter, the owner/operator of a vessel is the generator is hazardous waste generated from the vessel and must assume generator responsibilities.

1.7) Letter from John Masterman, Chief, RCRA Management Unit, Hazardous Waste Management Section of the California Department of Health Services, dated May 14, 1986, to Lieutenant Commander Bell, U.S. Navy, stating the U.S. Navy is the generator of hazardous waste generated on-board Navy vessels under repair at private contractor's facilities.

1.8) Examples of U.S. Navy standard contract items requiring private contractor to assume generator responsibilities.

1.9) Example of manifest document disclaimer used by Southwest Marine to ship U.S. Navy hazardous waste to TSDF.

Issue 2: DTSC opposition to Southwest Marine's request for redetermination of taxes and fees.

2.1) California Division of Toxic Substance Control Prehearing Brief from Joan A. Markoff, Staff Attorney, Toxics Legal Office, dated March 18, 1992, to the California State Board of Equalization.

2.2) Southwest Marine Statement of Position in Response to Prehearing Brief and Reply to Petition for Redetermine and Claim for Refund from W. Alan Lautanen of Gray, Cary, Ames & Frye, dated April 8, 1992, to California State Board of Equalization.

2.3) Reporter's Transcript of Hearing, dated May 15, 1992.

2.4) Decision and Recommendation of the State Board of Equalization in the matter of Southwest Marine's request for Redetermination, dated June 17, 1992.

2.5) Southwest Marine's Request for Reconsideration to the California State Board of Equalization, dated July 16, 1992

2.6) Letter from Herb L. Cohen, Senior Staff Counsel, California State Board of Equalization, dated July 29, 1992, to Southwest Marine, denying Request for Reconsideration.

2.7) Letter from W. Alan Lautanen, of Gray, Cary, Ames & Frye, dated August 10, 1992, requesting an oral hearing before the full Board in the matter of Southwest Marine's Request for Redetermination.

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

GEORGE DEUKMEJIAN, *Governor*

DEPARTMENT OF HEALTH SERVICES

4 P STREET

AENTO, CA 95814

(324-1826

HW FILE

JUN 28 1984

Mr. M. H. Donley
General Manager
Commercial Cleaning Corporation
P.O. Box 938
National City, CA 92050

Dear Mr. Donley:

This is in response to your recent letter requesting clarification on the generator of wastes from a naval vessel at a commercial shipyard.

The Navy is the generator of the waste and must sign the manifest. The Navy is the person whose act produced the hazardous waste, i.e., the generation of bilge water while operating the vessel.

The Navy should contact Kit Davis at (916) 323-6043 to determine the proper E.P.A. identification number to use and to resolve any other questions regarding manifesting.

If you need further clarification or information, please contact John Masterman at (916) 323-6042.

Sincerely,

John Masterman for

Richard Wilcoxon, Chief
Toxic Substances Control Division

cc: Alex Vinck
Production Manager
Southwest Marine, Inc.
San Diego Division
P.O. Box 13308
San Diego, CA 92113-0308

✓	PRESIDENT
✓	V. PRESIDENT
✓	PROD. SUPT. (NAVY)
✓	PROD. SUPT. (COMM'L)
✓	CONTRACTS
✓	ESTIMATING
	PERSONNEL
	ACCOUNTING
✓	QA
✓	SAFETY

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF HEALTH SERVICES
107 SOUTH BROADWAY, ROOM 7011
LOS ANGELES, CA 90012
620-2380

June 4, 1985

Mr. Bruce Gair
Southwest Marine
P. O. Box 13308
San Diego, CA 92113-0308

Dear Mr. Gair:

ASBESTOS WASTE GENERATION FROM NAVY SHIPS

Reference is made to your May 28, 1985 telegram concerning the asbestos wastes that are removed by your company from ships of the U.S. Navy.

The Department concurs with you that the Navy, as the shipowner, is the generator of the asbestos wastes and therefore must conform with the requirements of Article 6 of the California Administrative Code, Title 22, Division 4, Chapter 30 - Minimum Standards for Management of Hazardous and Extremely Hazardous Wastes.

If you have any questions or need additional information, please call Susan B. Romero of my staff.

Sincerely,

Harry N. Sneh
Facility Permitting Unit
Southern California Section
Toxic Substances Control Division

HS:SR:kp

COUNTY OF SAN DIEGO

DEPARTMENT OF HEALTH SERVICES
1700 Pacific Highway, San Diego, CA 92101
JAMES A. FORDE, Director

DIVISION OF ENVIRONMENTAL HEALTH PROTECTION
HAZARDOUS MATERIALS MANAGEMENT
(619) 236-2222

October 31, 1985

H. E. Engel, General Manager
Southwest Marine, Inc.
P. O. Box 13308
San Diego, CA 92113

NOTICE OF VIOLATION

This Notice of Violation is a result of procedures established by the Supervisor of Shipbuilding Conversion and Repair as to the generation, handling, storage, transportation and disposal of asbestos as a hazardous waste.

Between February 11, 1985 and August 9, 1985 Southwest Marine, Inc. under contract with the U. S. Navy and at the direction of Supervisor of Shipbuilding Conversion and Repair removed approximately 10,000 pounds of asbestos waste from the Pluck and the Standley. The asbestos waste was removed from the ships while in drydock at Southwest Marine's facility located at the Foot of Sampson Street in San Diego. This asbestos waste has been stored by Southwest Marine at their establishment for more than 90 days.

This situation has resulted in the following violations:

a. The U. S. Navy is in violation for failure to manifest the asbestos waste as the legal generator. The California Administrative Code, Title 22, Division 4, Chapter 30, Article 6, Requirements for Generators of Hazardous Waste, Section 66484 states "The generator of any hazardous or extremely hazardous waste to be transported offsite shall: (1) Complete the generator and waste section and sign the manifest certification."

b. Southwest Marine, Inc. is in violation for storage of hazardous waste for more than 90 days. The California Administrative Code, Title 22, Division 4, Chapter 30, Article 4, Hazardous Waste Facility Permit and the California Health and Safety Code, Chapter 6.5, which requires a permit from the State Department of health Services for storage of hazardous waste.

The U. S. Navy and Southwest Marine, Inc. must comply within 15 days.

If you wish to discuss this matter please call Dan Avera of the Hazardous Materials Managment Unit at 236-2222.

LATHAM & WATKINS
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DANA LATHAM (1898-1974)

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January 22, 1986

Angelo Bellomo
Chief, Southern California Section
Toxics Substances Control Division
California Department of Health Services
107 S. Broadway, Room 7128
Los Angeles, California 90012

Re: U.S. Navy Violations of California Hazardous Waste Control Requirements

Dear Mr. Bellomo:

Recently, the United States Navy ("USN") has refused to perform generator requirements for hazardous wastes produced by USN vessels and boats ("Navy ships") when berthed or dry-docked at commercial or public shipyards or docks in the San Diego area. This refusal is a clear violation of the requirements of State law, and has created an untenable regulatory and economic dilemma for San Diego's ship repair contractors and sub-contractors ("Contractors").[1]

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1. This letter is submitted by Latham & Watkins on behalf of National Steel & Shipbuilding Company and the Port of San Diego Ship Repair Association, whose membership includes A & E Industries, American Rigging Supply, Arcwell Corporation, Bay City Marine, Bowman Brothers, Colt Industries, Control's Engineering Maintenance Corporation, Continental Marine of San Diego, Crown Welding Company, Fryer-Knowles, Inc., H. C. Fraser, Harbor Services, Inc., Kettenberg Marine, Maritime Power, Inc., Owens Corning Fiberglass, Pacific Marine Sheet Metal Corporation, PDS, Inc., Pac Ord, Inc.,

Because the USN has refused to manifest hazardous wastes from Navy ships temporarily berthed at non-Navy docks, the Contractors are compelled either: (1) to perform generator duties for the USN - duties which they are not legally required to perform, which they cannot perform in some respects, and which carry substantial long-term economic risks which the Contractors cannot assume; or (2) not to perform those duties and become potentially subject to enforcement actions for hazardous waste conditions not of their making. The USN, however, appears determined not to conform its conduct to the requirements of State law, and has established ship repair contracting policies intended to shift the burden of its hazardous waste generator duties to others.

The Department of Health Services' assistance is urgently required to correct the USN's misunderstanding of its legal obligations under California law, and otherwise to ensure the USN's compliance with applicable requirements of the State hazardous waste control program. To facilitate your review of this matter, we have included here an extensive discussion of the relevant facts and law, an analysis of the USN's position with respect to the management of hazardous waste produced by Navy ships, and copies of pertinent correspondence and USN policies.

A. Background

The Contractors perform repair and alteration work in San Diego on Navy ships under government contracts with the Department of the Navy. While the Contractors frequently perform such work on Navy ships when they are berthed or dry-docked at USN facilities (e.g. the 32nd Street Naval Station or the North Island U.S. Naval Air Station), repairs or alterations may also be performed on Navy ships berthed or dry-docked at San Diego shipyards owned or operated by the Contractors or docks leased by the Contractors from the San Diego Port Authority ("commercial facilities").

Propulsion Controls Engineering, Ram Enterprises, Southwest Marine, Inc., Triple "A" South, Performance Contracting, Inc., Cleaning Dynamics Corporation, West Coast Coating, R. Slayen, Ltd.,

Ship repair work is a large-scale activity which may take months to complete. During repairs, Navy ships may be moved back and forth between USN facilities and commercial facilities. Regardless of the ship's berthing location, the USN maintains a significant presence of its personnel aboard the vessel. The ship's crew remains assigned to the ship throughout the repair period, sometimes assisting the Contractor while at other times performing repair work without Contractor assistance. In addition, a variety of other USN ship repair teams or commercial repair groups unrelated to the Contractors are normally aboard.

The nature of the work performed varies from contract to contract. Common to nearly all ship repair work, however, is the need to handle hazardous wastes generated by the USN. Regardless of whether work is performed on Navy ships berthed at a USN facility or a Contractor's shipyard, there is frequently a need to: (1) manage bilge water generated by Navy ships; or, (2) manage asbestos wastes removed from Navy ships.

Each of these wastes is listed as a hazardous waste under California law, and the USN has never questioned its responsibility for the proper management of such wastes when Navy ships are berthed or dry-docked at USN facilities. Recently, however, the USN refused to manifest asbestos wastes removed from a Navy ship berthed at Southwest Marine, Inc.'s San Diego shipyard. The refusal to manifest this waste resulted in the issuance by the County of San Diego Department of Health Services ("CDOHS") of a Notice of Violation ("NOV") of the California Hazardous Waste Control Law to the USN, which CDOHS had determined was the legal generator of these wastes./2 See Exhibit A.

In response to the NOV, the USN contended that it was not responsible for the management of hazardous wastes generated on Navy ships when they are berthed or dry-docked

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2. Note that while the CDOHS correctly determined that the USN had violated state requirements for this waste, CDOHS also alleged that Southwest Marine, Inc. had illegally stored wastes on-site, even though the cause of this dispute was the USN's original refusal to manifest these wastes for disposal.

at Contractor facilities. The USN argued that it has sovereign immunity from such enforcement actions, that it need not comply with State requirements for waste listed as hazardous by the State but not by federal law, and that in any event the USN is not the generator of wastes produced on Navy ships that are undergoing repair at commercial facilities. See Exhibit E. Ironically, the USN continued to acknowledge that it is the generator of these wastes when they are removed from Navy ships when repaired by a Contractor at a USN facility. See Exhibits B and F.

Soon thereafter, the USN Supervisor of Shipbuilding and Repair in San Diego issued a determination that the USN could not manifest any hazardous wastes from Navy ships at Contractor shipyards since the USN did not possess an EPA Generator Identification Number for those facilities, and would no longer manifest wastes from Navy ships at Contractor repair yards after December 20, 1985. See Exhibits B and C.

In December 1985, the Chief of Naval Operations ("CNO") issued an ambiguous policy statement concerning the performance of hazardous waste generator duties for hazardous wastes removed from Navy ships. Apparently, the USN has decided that Navy ships should not be considered hazardous waste generators ". . . because the administrative and legal responsibilities of being a generator are not compatible with the mobile nature of our ships." See Exhibit D. Based on this conclusion, the CNO determined that the shore facility where the ship is located at the time wastes are removed from the ship ". . . is considered the generator . . . and has the responsibility for handling the [hazardous waste] in compliance with RCRA." Id.

Since the USN has advanced different arguments regarding its purported lack of responsibility for the management of hazardous wastes produced by its ships when berthed at commercial facilities, we have, for present purposes, construed the USN's position as embracing several elements:

1. Because of sovereign immunity, the USN need not comply with the requirements of the California Hazardous Waste Control Law governing the management of hazardous waste, or at least that it is immune from administrative

orders or other proceedings initiated to compel USN compliance with those laws;

2. Assuming that the Navy must comply with California law, the USN is not responsible for the management of wastes generated by Navy ships when they are berthed at commercial facilities since the USN is not the generator of such wastes;

3. Assuming that California law does apply, the USN cannot manifest hazardous wastes removed from Navy ships at commercial facilities since the USN does not possess an EPA Generator Identification Number ("EPA ID") for those facilities (and apparently is incapable of obtaining EPA ID's for such facilities), and in any event suffers practical disadvantages which make the Contractors better suited to perform generator duties.

Based on these contentions, individually or in combination, the USN is attempting to shift to the Contractors its legal responsibility for, and the cost of managing, hazardous wastes generated by Navy ships. In fact, however, the USN has an affirmative obligation to comply with California hazardous waste control regulations; the USN is the generator of hazardous bilge water and asbestos wastes removed from USN ships, regardless of where they are berthed; and, the USN is legally required and uniquely able to complete generator duties for wastes produced by its ships.

B. The USN Has An Affirmative Obligation To Comply With The Provisions Of The California Hazardous Waste Control Law, And Is Amenable To Injunctive Relief And Sanctions For Violations Of State Requirements

The federal program regulating the treatment, storage and disposal of hazardous wastes is contained in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., which expressly requires federal agencies and departments to comply with all federal, state and local hazardous waste management requirements. RCRA § 6001, 42 U.S.C. § 6961, states in part that:

> Each department . . . of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any solid waste

> management facility or disposal site or (2) engaged in any activity resulting, or which may result, in the disposal or management of hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. (Emphasis added).

The United States Navy is unquestionably a department of the executive branch of the federal government. Through its operation and maintenance of Navy ships, the USN is undeniably engaged in activities which result in the necessity to dispose of or otherwise manage hazardous wastes, e.g. bilge water and asbestos hazardous wastes among others. Pursuant to RCRA § 6001, the USN therefore has an affirmative obligation to comply with all Federal, State and local "requirements, both substantive and procedural, . . . respecting control and abatement of solid waste or hazardous waste disposal," (emphasis added) and is amenable to injunctive relief and sanctions for failure to comply with such requirements.

In response to this express congressional mandate, the USN has observed that statutes in derogation of sovereign immunity are to be strictly construed, and that RCRA § 6001 does not subject the USN to state or local regulations for the proper management of wastes "which [are] not listed as hazardous in the federal [RCRA] regulations." See Exhibit E. This contention is patently wrong.

First, the Federal, State and local "requirements" with which the USN must comply under the express language of RCRA § 6001 clearly include a hazardous waste generator's duties under California law. As stated by the court in

California v. Walters, 751 F.2d 977 (9th Cir. 1984), ". . . state waste disposal standards, permits, and reporting duties clearly are 'requirements' for the purposes of § 6961 [i.e. RCRA § 6001]." Id. at 978. The court in Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985), has also held that RCRA § 6001 waived federal sovereign immunity with respect to the U.S. Navy's compliance with Florida's "requirements" governing hazardous waste management, provided that such "requirements" are comprised of "objective and ascertainable state regulations," or "specific, precise standards," including "control requirements." Id. at 163.

In California, state regulatory requirements for the control of hazardous waste are contained in the California Administrative Code, Title 22, Chapter 30. Under these regulations, a generator of hazardous waste is required to obtain an EPA identification number. See Cal. Admin. Code, Title 22, R. 66472. If the generator transports hazardous waste for off-site treatment, storage or disposal, he must complete a manifest for the shipment which states among other things the generator's EPA ID, the nature and quantity of waste and its intended off-site destination. See Cal. Admin. Code, Title 22, R. 66480-66484. These California generator regulations are precise and objective standards governing the control of hazardous wastes, and as such are valid "requirements" of State law with which the USN must comply pursuant to RCRA § 6001.

The USN's argument that it need not comply with State law requirements for wastes which are not listed as hazardous under the federal regulations makes no sense. As is expressly stated in RCRA § 6001, departments of the federal government are required to comply with all requirements of State law, as well as the requirements of federal and local laws. The California laws governing the control of hazardous wastes specifically list both bilge water and asbestos as hazardous wastes subject to regulation under the California hazardous waste control program. Cal. Admin. Code, Title 22, R. 66680(c)(75) and R. 66680(e). Whether or not asbestos is "listed" as a hazardous waste under 40 C.F.R. Part 261 - which contains the several federal definitions of hazardous wastes for the purpose of the federal hazardous waste control program under RCRA - is absolutely irrelevant to RCRA § 6001's mandate that the USN comply with California requirements for the management of asbestos, a

waste specifically determined by the State to be hazardous and subject to regulation under California hazardous waste control laws.

In fact, the listings of hazardous wastes contained in 40 C.F.R. Part 261 (i.e. the RCRA regulations which define what constitutes a hazardous waste for the purposes of federal hazardous waste control program) are irrelevant to this case. Pursuant to RCRA § 3006, States may administer and enforce their own hazardous waste control programs in lieu of the federal RCRA program either on an interim or a final basis. See RCRA §§ 3006(b) and (c). California received its initial interim authorization to administer the State's hazardous waste control program in lieu of the federal program on March 23, 1981. See 45 Fed. Reg. 29935 (1981). Part of this authorization included express approval of California's listing of hazardous waste:

> EPA has determined that the State's [i.e. California's] definitions and lists of hazardous and extremely hazardous wastes meet the minimum requirement that they cover a universe of waste nearly identical to that which is controlled by the Federal program under 40 C.F.R. Part 261.

Id. As EPA correctly stated in its authorization of the California hazardous waste control program,

> The practical effect of this decision is that generators, transporters, and owners and operators of hazardous waste management facilities in California will be subject to the State of California hazardous waste program in lieu of the Federal hazardous waste program (40 C.F.R. Parts 260-263 and 265) . . .

Id./3

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3. Cal. Health & Safety Code § 25159.5 was amended in 1984 and incorporates into State law all RCRA regulations promulgated by EPA, including 40 C.F.R. Part 261. However, that provision further states that existing California laws and regulations which are more stringent than federal regulations are also in effect, a result

Therefore, not only is the fact that 40 C.F.R. Part 261 does not list a waste as hazardous irrelevant to RCRA § 6001's requirement that the USN comply with the provisions of State hazardous waste control laws,/4 but the provisions of 40 C.F.R. Part 261 are themselves irrelevant in this case since EPA has approved the State hazardous waste control program pursuant to RCRA § 3006 and since the relevant requirements of state law are more stringent than corresponding federal regulations.

Accordingly, the USN's argument that it need not comply with state requirements for wastes from Navy ships not "listed" as hazardous under 40 C.F.R. Part 261 is incorrect. Indeed, not even the USN takes it seriously, as is evident from the fact that the USN has repeatedly acknowledged the applicability of California hazardous waste control laws (including state regulations defining hazardous wastes) to the management of wastes from Navy ships, regardless of whether the ships are berthed at a USN facility or a commercial facility. See Exhibits B, C and F and references cited therein.

Since the USN is a department of the federal government, since the USN engages in activities in California which do or may result in the need to manage of hazardous wastes, and since California laws and regulations governing a generator's control of hazardous wastes are ascertainable and objective standards that constitute valid state "requirements" with which the USN must comply pursuant to RCRA

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expressly authorized by RCRA § 3009. Thus, even if bilge water and asbestos hazardous wastes were not hazardous under 40 C.F.R. Part 261 (see f.n. 4 below), the more stringent California hazardous waste identification requirements would control.

4. Note also that the listing of waste in 40 C.F.R. Part 261 is not the only method for determining whether a waste is hazardous under the federal program. A solid waste, even if not "listed," is a hazardous waste if it meets any of the several other definitional criteria specified in 40 C.F.R. § 261.3. Thus, asbestos may be a hazardous waste even though not specifically listed as such by federal regulations.

§ 6001, the sole remaining issue in the USN's sovereign immunity argument is whether the USN has immunity from enforcement actions brought by authorized State agencies to compel through injunctive relief and sanctions the USN's compliance with the provisions of California hazardous waste management requirements.

The answer to this inquiry is obviously no; there is no such immunity. Under the express and unambiguous terms of RCRA § 6001, the USN is required not only to comply with relevant provisions of California law regarding the control and abatement of hazardous waste, but is also subject to:

> . . . any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief . . . . Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

RCRA § 6001.

While it may be that the RCRA § 6001 waiver of sovereign immunity does not make a federal department subject to criminal sanctions for violations of State requirements, see California v. Walters, 751 F.2d 977 (9th Cir. 1984), and while it may be that this waiver does not make federal departments subject to certain monetary remedies provided by State law, see Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985), it is absolutely clear under the statute and case law that the United States is both required to comply with "requirements" of State law and is subject to State injunctive relief and sanctions for violations of California hazardous waste control requirements.

C. The USN is the Generator of Hazardous Wastes Produced On Navy Ships, Regardless of Whether Navy Ships Are Berthed or Dry-Docked at USN Facilities or Contractor Shipyards, And Must Obtain A Generator Identification Number For Such Activity

With respect to asbestos wastes removed from Navy ships berthed at Contractor shipyards at least, the Navy has contended that it is not the generator of these wastes and therefore not responsible for their management. For the reasons discussed below, it is clear that the Navy has misconstrued its generator status with respect to asbestos wastes and that the Navy is also the generator of bilge water on Navy ships, regardless of where the ship is located when such wastes are generated.

Several statutory and regulatory definitions are germane to this discussion. Under the California hazardous waste control program, the term "generator" is defined as:

> any person, by site, whose act or process produces hazardous waste identified or listed in Article 9 or 11 of this chapter or whose act first causes a hazardous waste to become subject to regulation.

Cal. Admin. Code, Title 22, R. 66078. The Hazardous Waste Control Act, Cal. Health & Safety Code § 25100 et seq., defines "waste" to include among other things:

> (a) Any material for which no use or reuse is intended and which is to be discarded.
>
> (b) Any recyclable material.

Cal. Health & Safety Code § 25124. Finally, a "hazardous waste" means:

> a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either:
>
> (a) Cause, or significantly contribute to an increase in mortality or an increase in

serious irreversible, or incapacitating reversible, illness.

(b) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Cal. Health & Safety Code § 25117./5 One or more of these definitions applies to the determination of whether the Contractors or the USN is the "generator" of the wastes.

"Bilge water" is a term used here generically to refer to waste fuels and oils or other liquid or semi-solid substances containing hazardous constitutents which accumulate on Navy ships as a result of operating or maintaining the ship's engineering systems. The precise composition of bilge water can vary, but it is in any event listed as hazardous under California law. See Cal. Admin. Code, Title 22, R. 66680(e).

Bilge water is also undeniably a waste. Such waters are removed from Navy ships and are either treated to extract recyclable products or else are disposed of. In either event, bilge water is a waste under Cal. Health & Safety Code § 25124 since that provision defines as waste both materials with no further intended use or reuse, or those materials which may be recycled. Bilge water is primarily produced as a result of operating engineering systems on Navy ships, and there is no question but that the USN, as the owner and operator of Navy ships, is the person whose act results in the production of these hazardous wastes.

The California Department of Health Services ("DOHS") previously considered the issue of who is the generator of bilge water on Navy ships berthed at commercial shipyards, and concluded, as we have, that:

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5. Further definition of "hazardous waste" is provided in Cal. Admin. Code, Title 22, Chapt. 30, Articles 9 and 11. As discussed above, both bilge water and asbestos are listed as hazardous waste under California law. See Cal. Admin. Code, Title 22, R. 66680(e) and R. 66680(c)(75).

> The Navy is the generator of the waste and must sign the manifest. The Navy is the person whose act produced the hazardous waste, i.e., the generation of bilge water while operating the vessel.

See Exhibit G.

The same is true of asbestos wastes (a material formerly installed on Navy ships as lagging, i.e., pipe insulation), although the USN contends that lagging is not a hazardous waste until the Contractors cut and remove it under contracts with the USN. Before such action occurs, the USN claims lagging continues to serve a useful purpose. See Exhibit E. Based on this analysis, the USN asserts that the Contractors are the generators of the asbestos waste since it was the Contractor's act of asbestos removal which "produced the hazardous waste or first caused the hazardous waste to become subject to regulation" (paraphrasing here the definition of generator). Id.

The USN's analysis is wrong, however, both as a matter of law and fact. A person is a generator if he meets either of the two criteria specified in Cal. Admin. Code, Title 22, R. 66078: (1) if a person's act or process produces a hazardous waste, he is a generator; or, (2) if a person's act first causes a hazardous waste to become subject to regulation, he is a generator. The Navy's contention in regard to asbestos, i.e. that Contractors generate the waste because the lagging continues to serve a useful purpose until it is cut and removed, conveniently overlooks the definition of the term "waste."

As noted above, "waste" means a material for which no further use or reuse is intended and which is intended to be discarded. The disposition of asbestos lagging on Navy ships is a matter solely within the USN's control: the USN specified or accepted the installation of asbestos lagging on Navy ships in the first place; the USN owns the asbestos lagging; and, the USN determines when asbestos lagging is not intended for further use and should be removed. If the Navy did not decide that asbestos lagging on one of its ships had no further intended use, the USN would not contract for its removal and the Contractors would never be involved.

To assert that asbestos lagging continues to serve a useful purpose until it is removed is simply wrong in the context of a ship undergoing repair or alteration. Before a ship is repaired, the Navy has already decided which lagging has no further intended use and should be discarded, and either has the lagging removed by its own crews or hires a Contractor to remove it, or both. Under the definition of "waste," the asbestos lagging is waste once the USN has decided that it is no longer intended for further use and should be discarded. The fact that the USN is the entity which makes this determination is evidenced by the fact that it contracts for the removal of asbestos lagging which the USN no longer wants to be used on its ship.

Alternatively, the USN's argument could be construed as contending that a Contractor's removal of asbestos waste from Navy ships first makes the waste subject to regulation, therefore making the Contractor the generator under the second definition of "generator" contained in Cal. Admin. Code, Title 22, R. 66078. Even assuming that it were the actual, physical removal of asbestos hazardous waste from Navy ships that makes such wastes subject to regulation (an assumption which is not true for the reasons discussed below), such a result would not alter the fact that the USN, because it has already decided that the asbestos lagging has no further intended use, is still the generator of such waste. In any event, the USN's argument in this regard misconstrues the alternative definition of generator.

The California alternative definition of "generator" precisely parallels the federal definition of that term. See 40 C.F.R. § 260.10 (definition of "generator"). Under federal regulations, it is necessary to include as a generator the person whose act "first causes a hazardous waste to become subject to regulation" since 40 C.F.R. § 261.4(c) excludes from regulation

> hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste treatment manufacturing unit . . . until it [i.e. the hazardous waste so generated] exits the unit in which it is generated . . .

Asbestos wastes from Navy ships, however, are not generated in product or raw material storage tanks, a product or raw material transport vehicle or vessel, or in a manufacturing process unit, and therefore are not materials which are excluded from regulation until they exit a non-regulated hazardous waste generation unit. Thus, the USN's contention that asbestos waste is not a hazardous waste until removed from Navy ships is wrong, and the alternative generator definition is irrelevant to the issue.

As was the case with bilge water, DOHS has previously reviewed the issue of whether the Contractors or the USN is the generator of asbestos wastes removed from Navy ships, and concluded that the USN is indeed the generator of those wastes and must comply with the requirements of California law in their management. See Exhibit H.

Next, the USN appears to contend that a ship's berthing or dry-dock location determines who is the generator of wastes produced on Navy ships. If the ship is berthed at a Contractor facility, the Contractor is the generator. If the ship is berthed at a Navy facility, the USN is the generator. See Exhibits C and F. In this regard, the USN also states that

> inasmuch as ship repair contractor facilities are not owned or operated by the U.S. Navy, the U.S. Navy does not possess a U.S. Environmental Protection Agency (EPA) Generator Identification Number of these facilities. The Navy, therefore, cannot legally manifest wastes generated at these locations . . .

See Exhibit B./6 For the reasons discussed below, this contention is not only meritless, but in fact suggests a further instance of the USN's failure to comply with the requirements of State law.

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6. We have assumed here that the USN's argument is made in relationship to all off-site management of such wastes, and that the statement that the USN cannot manifest such wastes is not limited solely to any legal problem it may have under California law in manifesting wastes from Navy ships to its North Island treatment facility.

First we dismiss the obvious. The definition of generator states "a person, by site, . . ." (emphasis added). The prepositional phrase "by site" modifies the word "person," and cannot be construed as meaning that "the site" determines who is a generator. Instead, it is the person whose act produces the waste (or whose act first causes the hazardous waste to be subject to regulation) that determines who is the generator, and such person is the generator at each site where he produces the waste, regardless of whether he owns or operates that site. Therefore, a person is a generator at each site where he produces hazardous wastes; the site of a person's hazardous waste production does not absolve him of his generator duties under either California or federal regulations.

As discussed above, California law requires generators to manifest their waste if they are to be managed off-site. See Cal. Admin. Code, Title 22, R. 66480 et seq. Generators are required to have EPA identification numbers and may not manifest wastes without one. See Cal. Admin. Code, Title 22, R. 66472. Where a person is a generator at several sites, he must have a separate EPA ID number for each site.

Regardless of where a Navy ship is berthed, the "site" of the hazardous waste generation is the ship itself, not its berthing location. EPA has previously issued EPA ID numbers for ships, and DOHS apparently has a policy in place to address the issue. See Exhibit G. Thus, contrary to the USN's claims, the "site" of bilge water and asbestos waste generation is not the facility at which the ship is berthed or dry-docked. Even if the berthing location of a ship could be considered a "site," that difference in location would not, as a matter of law, make the owner of that site the generator of the USN's waste. As discussed above, the regulations have just the opposite effect. Where the USN is the generator of a waste, it is the generator of the waste regardless of the location. Therefore, the USN's professed lack of an EPA ID for ships berthed at commercial facilities is hardly a reason why it cannot manifest such waste and, in fact, suggests a further conscious violation of State law.

As a final argument against the existence of its legal obligations, the Navy analogizes the Contractors, who repair Navy ships as large as aircraft carriers, to automobile mechanics. "If the [mechanic] generates any hazardous

waste during the course of repairs," the USN states, "the [mechanic] (and not the automobile owner) would be deemed the generator of that waste."/7 See Exhibit E. Moreover, the USN says, the mechanic is in a better position than the automobile owner to complete the informational requirements of the manifest for such waste. Id.

We are unaware of any recent instances where the commander of a major surface combatant dropped his ship off at the local shipyard for a tune-up and oil change, left the keys and asked to be called when the work was done so he would know when to come back to pick it up. Ship overhaul activities, for reasons of scale, ownership presence and actual performance, have nothing in common with automobile repairs. Because of the manner in which Navy ship repairs are performed at commercial shipyards, the USN's analogy is completely inapposite, and the USN - unlike the hypothetical automobile owner - is both able and in fact better positioned than the Contractors to complete manifests for hazardous wastes removed from Navy ships berthed at commercial facilities.

The USN maintains a significant presence of its personnel on ships undergoing repair work at commercial facilities. The ship's company remains assigned to the ship throughout the repair period to perform repairs not undertaken by the Contractors, and the crew frequently assists the Contractors in the performance of other repairs. In addition to normal working days, a portion of the ship's crew will remain aboard 24 hours a day to ensure continued safety of the ship during non-working hours. Other USN repair teams, including the USN Ship Intermediate Maintenance Activity ("SIMA") and various Navy mobile repair units, will also be simultaneously engaged in ship repair activities.

Additionally, the USN's Supervisor of Shipbuilding, Conversion and Repair ("SupShip") in San Diego

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7. It is interesting to note that this analogy assumes its conclusion: it concludes that a mechanic who generates hazardous waste is a generator, and therefore fails on its own circular logic. Moreover, for the reasons described above, the Contractors are not the generators of hazardous waste on Navy ships.

maintains a significant military and civilian staff which has responsibility for awarding and administering ship repair contracts, overseeing Contractor performance and inspecting completed Contractor work before final acceptance. When Navy ships are berthed or dry-docked at commercial facilities, SupShip administrators and inspectors are present at the Contractor's facility and aboard the Navy ship on a daily basis. Indeed, a requirement of every ship repair contract where work is performed on a ship located at a commercial facility is for the Contractor to assure USN access to the ship and to provide SupShip persons and others office space for their use.

In light of these facts, the USN's status during ship repair work cannot be analogized to that of an automobile owner who is absent during the repair of his car. More important, however, is the fact that the significance of the USN's presence on Navy ships in commercial shipyards makes the USN as able to complete hazardous waste manifests for ship-generated hazardous waste as the Contractors. The USN's ability and procedure for manifesting hazardous waste from Navy ships being repaired by Contractors when the ship is berthed or dry-docked at a USN facility as opposed to a commercial shipyard proves the point. See Exhibit F. The only difference between these circumstances is that the hazardous waste transporter must gain access to a USN facility as opposed to a Contractor repair yard, a difference which hardly makes the Contractors better able to complete manifest for hazardous wastes generated on Navy ships than the USN.

Not only is the USN physically able to manifest wastes from Navy ships berthed at commercial facilities, but there are portions of the manifest which the Contractor cannot complete. As of September 1, 1985, all hazardous waste manifests must contain a certification by the generator that:

> (1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and
>
> (2) the proposed method of treatment, storage or disposal is that method cur-

> rently available to the generator which minimizes the present and future threat to human health and the environment.

RCRA § 3002(b). This is a certification which cannot be made by the Contractors since they are not the generators of the hazardous waste and since the Contractors have no control whatsoever over the volume or quantity of hazardous wastes produced on Navy ships. Only the USN has control over the volume and toxicity of hazardous bilge water and asbestos waste generated on Navy ships, and therefore only the USN, as the legal generator of the wastes, can make the waste minimization certification required on the manifests.

E. Conclusions

For the reasons discussed above, the USN is undeniably obligated to comply with California requirements for managing hazardous wastes which are generated on Navy ships, and is subject to injunctive relief and sanctions for non-compliance with such requirements. See RCRA § 6001; United States v. Walters, 751 F.2d 977 (9th Cir. 1984); Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985). As matters of law and fact, the USN is the generator of bilge water and asbestos hazardous wastes produced on Navy ships regardless of where they are berthed or dry-docked at the time such wastes are produced. The USN therefore must possess an EPA ID for these activities and complete manifests for those wastes. See Cal. Admin. Code, Title 22, R. 66472, 66480-84. Even if there were latitude in the law which might relieve the USN of its obligations (which there is not), there is no practical reason to shift the USN's mandatory duties to the Contractors; the USN is equally and in fact uniquely able to manifest hazardous wastes from Navy ships whether or not those ships are berthed at commercial or USN facilities.

Notwithstanding these facts, the USN is attempting to shift its California hazardous waste generator duties to the Contractors through the adoption of new Navy policy determinations, see Exhibit D, and contractual requirements. Recent requests for bids, for example, have included a requirement that all hazardous wastes removed from Navy ships when berthed at Contractor shipyards be considered "contractor-generated" and managed accordingly. The Contractors, however, do not and should not have these duties

under the California hazardous waste control laws, and should not be economically compelled by Navy contracting procedures to perform them.

Unless the Department of Health Services requires the USN to perform its legal obligations for the proper management of hazardous waste, it is likely that this instance of the USN's non-compliance with State law will continue. Unless the Department requires the USN to perform these duties, there will be hundreds of Navy ships home-ported in California cities which are not properly subject to hazardous waste regulation. While the Navy argues that the mobility of its ships makes compliance with such laws inappropriate, it is that very mobility which, from a state perspective, makes such regulation imperative. If the USN is allowed to avoid hazardous waste control requirements for wastes generated on its ships by transferring those wastes to shore facilities, such waste generation will never be adequately controlled by State laws. If a similar policy were followed by commercial ships, the loss of state control and hazardous waste accountability would be enormous.

The USN must and should perform its legal hazardous waste obligations, and the Department should take whatever actions are necessary in order to assure that compliance. We appreciate your attention to this matter and look forward to a speedy resolution of the problem.

Very truly yours,

David L. Mulliken
of Latham & Watkins
Attorneys for Port of
San Diego Ship Repair
Association

cc: Marsha Croninger, Esq.,
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Dan Avera, San Diego County
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January 23, 1986

Mr. Angelo Bellomo
Chief, Southern California Section
Toxic Substances Control Division
California Department of Health
Services
107 S. Broadway, Room 7128
Los Angeles, California 90012

Re: Executive Summary: U.S. Navy
Violations of California Hazardous
Waste Control Requirements

Dear Angelo:

Thank you for returning my call so promptly on Tuesday. As promised, I have enclosed our analysis of the position recently adopted by the U.S. Navy ("USN") concerning management responsibilities for hazardous wastes generated by its ships, together with relevant documents. At your suggestion, I am simultaneously forwarding the enclosure to Marsha Croninger of your staff for her review.

Given the volume of the enclosed materials, I thought it would be helpful to provide a summary overview of the issues. In essence, the USN has decided that it will no longer manifest wastes generated by its ships which are undergoing repair and alteration work at commercial shipyards, insisting instead that the ship repair contractors or subcontractors ("Contractors") assume the USN's generator duties. This wrongful refusal to comply with California Hazardous Waste Control Law ("HWCL") requirements has created an untenable regulatory and economic dilemma for San Diego Contractors, and has already

resulted in the issuance of one Notice of Violation to the USN by the San Diego County Department of Health Services.

In support of its position, the USN contends that it enjoys sovereign immunity from compliance with California hazardous waste regulations for materials not specifically listed as hazardous by federal regulations, e.g. asbestos and bilge water. The USN has also decided that a generator's legal and administrative duties are incompatible with the mobile nature of its vessels, and argues that it is not in any event the generator of hazardous wastes produced by its ships.

Not one of these arguments is correct. As a result of prior inquiries by the Contractors, the California Department of Health Services has already concluded that the USN is the generator of the hazardous wastes produced by Navy ships. It is also clear that the USN has an affirmative statutory obligation to comply with California hazardous waste control requirements and is amenable to injunctive relief and sanctions for its violations of California law. Moreover, there is no legal basis, or compelling practical reason, for exempting the USN from compliance with the HWCL simply because its ships move. In fact, the mobility of Navy ships (and ships in general) makes their regulation all the more imperative. Were the State to exempt from HWCL compliance all ships which use California ports, literally hundreds of waste-generating sites would not be subject to direct State control.

Because the USN's policies are to be implemented nationwide, the problem which has first surfaced in San Diego will soon affect the entire State. As I mentioned to you yesterday, it appears that the USN may already be implementing its new policies in the Bay Area.

Given the enormous potential economic and regulatory impact of the USN's new position on San Diego Contractors, we are of course anxious to resolve this matter as quickly as possible. We have already had unsuccessful discussions with local Navy representatives, who are completely constrained by the new Navy-wide policies. We have, however, been able to tentatively schedule a meeting with Navy policymakers in Washington, D.C. on February 5, 1985.

Subsequent to our conversation on Tuesday, we learned that we are not in fact under any obligation to communicate directly with Dr. Kizer on this matter. Therefore, in light of your interest, we will not forward the enclosure to him now, despite our previous indication to the contrary. We have, however, been informed by several Contractors that both local congressmen and the Lieutenant Governor have, as a result of previous meetings among them, requested further information regarding this growing dispute, requests which will need to be satisfied shortly.

I hope that the enclosed analysis will facilitate your staff's review of the matter. We will be in touch with Marsha early next week to determine if there is any other way in which we can be of assistance. If at all possible, it would be extremely helpful to us if we could discuss this matter with you before our scheduled trip to Washington early next month (although we certainly understand your time constraints). I will call to discuss this possibility with you next week.

Again, I appreciate your attention to this important issue, Angelo, and look forward to future discussions after you have had an opportunity to review the enclosed materials. In the meantime, please do not hesitate to call should you have any questions.

Very truly yours,

David L. Mulliken
of LATHAM & WATKINS

Enclosure

cc: (w/encl)

Marsha Croninger, Esq., California Department of Health Services

Dan Avera, County of San Diego Department of of Health Services

Port of San Diego Ship Repair Association

KSL003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 5 1986

Vice Admiral Peter J. Rotz
Chief, Office of Marine Environment
and Systems
United States Coast Guard
2100 2nd St., S.W.
Washington, D.C. 20593

Dear Vice Admiral Rotz:

We have been asked by members of your staff to clarify the applicability of EPA's regulations under the Resource Conservation and Recovery Act (RCRA) to operational wastes from ships. The Coast Guard's Reception Facility Requirements for Waste Materials Retained On Board, issued under Annex I of MARPOL 73/78 (50 FR 36768, September 9, 1985), have raised a number of questions regarding the status of ships and terminals/ports under the RCRA regulations. In particular, we have been asked to determine who is the generator of oily waste that is produced on ships and required under the Coast Guard's September 9, 1985 regulations to be discharged to reception facilities at ports and terminals.

We have determined that, as a general matter, for any oily waste that is produced in product or raw material vessel units, such as those used for bulk shipment of oil, both the ship and, in some circumstances, the operator of the central facility involved in removing the waste from the ship would be considered hazardous waste generators. For other types of oily waste, such as bilge water in vessel engine rooms contaminated with engine lubricant drippings or solvents, only the ship would be deemed to be the hazardous waste generator.

1. Generator requirements.

The RCRA regulations define a generator as any person, by site, whose act or process produces hazardous waste identified or listed in 40 CFR Part 261 or whose act first causes a hazardous waste to become subject to regulation. 40 CFR §260.10. Any person who generates a solid waste must determine if that waste is hazardous, and if so, must receive an EPA identification (ID) number before treating, storing, transporting or disposing of the waste. If the generator plans to move the waste off-site for treatment, storage or disposal, he must comply with certain requirements in Part 262, including preparing an EPA manifest, marking the waste, keeping records and filing reports. In addition, a generator may accumulate hazardous waste on-site for up

to 90 days without a permit if he complies with the requirements of §262.34(a)(1-4).

2. Types of waste subject to regulation

The oily wastes subject to Coast Guard regulation under MARPOL Annex I generally are produced in two ways. The first is through bulk shipment of oil, whereby sludges and sediments that settle out in the oil storage tank or unit must be periodically removed. Oil tankers also need to periodically dispose of oily ballast water and tank cleaning water. The second type of waste is produced from the use of oil as a fuel and lubricant in a ship's propulsion and auxiliary system. Bilge water that accumulates in engine rooms often contains high concentrations of oil from lubricant drippings and other routine losses. The bilge water may also be contaminated with other types of wastes. Both types of waste are solid wastes under §261.2.

Whether these wastes are hazardous wastes would be determined under §261.3. In general, the waste would have to be either (1) listed in Subpart D of Part 261; (2) identified in Subpart C of Part 261 (e.g., exhibits ignitability characteristic); (3) a mixture of solid waste and a listed hazardous waste; or (4) is derived from treating a listed hazardous waste. Under current EPA regulations, used oil is not listed as a hazardous waste,*/ and therefore, would have to meet (2), (3) or (4) above. We do not anticipate many situations in which one of these criteria would be met, with the possible exception of contamination of bilge water with spent solvents. (§261.31) However, even this possibility can be minimized if the bilge waters are segregatd from other wastes generated on the ship.**/

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*/ EPA's recent proposal to list used oil as a hazardous waste, if finalized, will change its current status under the RCRA regulations. See 50 Fed. Reg. 49212 (November 29, 1985).

**/ Under EPA's spent solvent listing, since a solvent is considered "spent" when it has been used and is no longer fit for use without being reclaimed or reprocessed, it is likely that solvents dripping from machinery and collecting in bilge water would not cause the wastewater to be hazardous. See 50 Fed. Reg. 53315, 53316 (December 31, 1985).

3. Regulation of oily waste under RCRA

The two types of oily waste from ships - - waste produced in product transport units and waste produced in the propulsion and auxiliary systems - - are treated differently under the RCRA regulations. Under §261.4(c), a hazardous waste generated in a product or raw material transport vessel is exempt from regulation until it exits the unit in which it was generated or unless it remains in the unit more than 90 days after the unit ceases to be operated for storage or transportation of the product or raw materials. These wastes are sludges and residues produced in tanks or holds that carry products or raw materials, where the products or raw materials are not in themselves hazardous wastes. See 45 Fed. Reg. 72024, 72026-27 (October 30, 1980).

As a result of this exemption, parties who remove the waste from the ship at a central facility by either emptying the product-holding unit or cleaning the holding tank are deemed to be generators under 40 CFR §260.10 because their actions cause the hazardous waste to become subject to regulation. In addition, the actions of both the operator and owner of the vessel and the owner of the product or raw material result in production of the hazardous waste. Thus, these parties, and any others that fit the generator definition, are jointly and severally liable as generators. See id. at 72026.

The Agency looks primarily to the central facility operated to remove sediments and residues to perform the generator duties, since it is the party best able to perform such generator duties as determining whether the waste is hazardous. Where the wastes are not removed at a central facility, however, the Agency looks to the operator of the vessel to perform the generator duties. Id. at 72027.

Engine-related wastes are treated quite differently in that they are regulated from the moment they are produced. Since the operation of the ship's propulsion system produces the oily wastes, the ship's owner and/or operator are generators. The facility involved in removing this waste from the ship is not a generator because it is not causing the waste to become subject to regulation - - this waste is already subject to regulation when produced in the ship. The facility may be a transporter (Part 263) or a treatment storage or disposal (TSD) facility (Parts 264-265), depending upon the actions it takes.

The Coast Guard's requirement that certain ports and terminals be certified to have available adequate reception facilities for ships' oily wastes does not necessarily determine the role of the

port or terminal in the RCRA regulatory scheme.*/ For example, a port or terminal that has available an independent waste hauler who transfers engine room waste directly into a tank truck does not appear to fit the definition of generator, transporter or TSD facility. The waste hauler, or whoever is engaged in the offsite (i.e., off the ship) transportation of the waste, would be deemed the transporter.

Of course, if the manifested waste is stored for any period of time in tanks or containers at the port or terminal, or if the waste is removed to and stored in a barge, both the port and barge storing the waste would be deemed TSD facilities subject to the requirements of Parts 270, 264 and 265. If whoever is transporting the manifested waste from the ship stores the waste in containers meeting the requirements of §262.30 at a transfer facility, such as a loading dock, the waste may be stored for 10 days without being subject to regulation under Parts 270, 264 and 265. See 40 CFR §263.12.

The ship, as the generator, is also a TSD facility to the extent that it is storing hazardous waste on board. Under §262.34, a generator may accumulate hazardous waste on site for 90 days or less without having a permit provided certain requirements are met. EPA is currently finalizing a proposed regulation that would extend this accumulation period for generators who generate between 100 - 1000 kilograms of hazardous waste per month. See 50 Fed. Reg. 31278 (August 1, 1985).

The Agency believes that the application of the RCRA regulations in this way will be workable for the ships and reception facilities subject to Coast Guard regulations. In situations where ships' owners or operators are unable to perform the generator duties, ships' agents that are available at ports or terminals to handle fueling and other necessary functions, such as carrying out Customs requirements, may perform these duties on behalf of the ship. The Agency would expect the shipping company or agent handling the required manifesting and record keeping functions to retain records either at its U.S. business headquarters or at the local agent's office located near the port or terminal where the ships have their waste removed.

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*/ Similarly, potential liability of parties under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is not necessarily determined by RCRA responsibilities. For example, under CERCLA §107, persons who arrange for transportation, disposal or treatment of hazardous substances are liable for certain costs, so that parties who are not "generators" under RCRA may nonetheless have certain CERCLA liabilities.

Also, any parties liable for performing generator duties may designate among themselves the person who will actually carry out those functions. For example, where both the ship and a central waste removal facility are deemed to be generators, they may mutually agree that the central facility will perform the generator duties.

We hope that this has been responsive to the Coast Guard's concerns regarding the interaction between the MARPOL and RCRA regulations. Please don't hesitate to contact me or Bruce Weddle of my staff at 382-4746 if you have any further questions.

Sincerely,

Marcia Williams

Marcia Williams
Director
Office of Solid Waste

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

GEORGE DEUKMEJIAN, Go

DEPARTMENT OF HEALTH SERVICES
714/744 P STREET
SACRAMENTO, CA 95814
(916) 324-6042

10 Office Copy Hsbestos 74
From Mike Andrean

MAY 14 1986

HAZWASTE

Lieutenant Commander Bell
Supervisor of Ship Building, Conversion and Repair
United States Navy
Hunters Point Shipyard, Building 813
San Francisco, CA 94124 - 2996
Attn: Code 400

Dear Commander Bell:

This letter is in response to the request in your recent telephone conversation with Larry Hatz of my staff for clarification of the requirement that the U.S. Navy obtain an EPA ID number for waste asbestos removed from navy ships.

We understand that the navy contracts with various private businesses for the removal of asbestos insulation and other hazardous waste from navy ships. The navy contends that when these services are performed at the contractors facilities, the contractor is the generator and must meet generator requirements specified in state and federal law. The navy therefore contends that it does not need to obtain an EPA ID number.

The Department does not agree and has concluded, in this and similar circumstances, that the person hiring the contractor is the generator of the waste who must obtain an EPA ID number and meet all other applicable generator requirements.

This position is based on the following statutory and regulatory provisions:

1. Section 25118 California Health and Safety Code (H&SC) defines "person" as:

> "Person" means an individual, trust, firm, joint stock company, corporation, including, but not limited to, a government corporation, partnership, and association. "Person" also includes any city, county, district, and the state or any department or agency thereof, and the federal government or any department or agency thereof to the extent permitted by law. (emphasis added)

Under this definition, the hazardous waste control provisions of Chapter 6.5 H&SC and the regulations promulgated thereunder that specify requirements or restrictions on "persons" apply to the navy as an agency of the federal government to the extent permitted by law.

Federal law in this area is found in the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C., Section 6901 et seq., 42 U.S.C. Section 6961 states in part:

> Each department . . . of the executive, legislative and judicial branches of the federal Government (1) having jurisdiction over any solid waste management facility or disposal site or (2) engaged in any activity resulting, or which may result, in the disposal or management of hazardous waste shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting the control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. (Emphasis added).

Clearly, federal law requires federal agency compliance with state hazardous waste control laws.

2. Section 25124 H&SC defines "waste" as (in part):

> (a) any material for which no use or reuse is intended and which is to be discarded.

The asbestos meets this definition since it is being removed because no further use or reuse is intended and the asbestos will be discarded.

3. Section 25115.5 defines "hazardous" as:

> "Hazardous" means a characteristic which meets both of the following:
>
> (a) Has the capability of doing either of the following:
>
> 1. Causing or significantly contributing to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.
>
> 2. Posing a substantial present or potential risk to human health or the environment.
>
> (b) Conforms to a criterion adopted by the department pursuant to Section 25141.

Asbestos conforms to the criteria adopted by the Department and set forth in Title 22 California Administrative Code (22 CAC Section 66699), and has been shown to contribute to an increase in mortality or serious irreversible illness and to pose a present or potential risk to human health.

Asbestos is, therefore, a hazardous waste and its handling, storage, transportation, and disposal is fully regulated under California law.

Title 22 CAC Section 66480 requires the generator of hazardous waste to complete a uniform hazardous waste manifest before off-site transportation of the waste.

4. Generator is defined in 22 CAC Section 66078, as any person, by site, whose act or process produces hazardous waste identified or listed in Article 9 or 11 of this chapter or whose act first causes a hazardous waste to become subject to regulation.

The navy is the "person" whose act first causes the asbestos to become subject to regulation, because the navy makes the decision that the asbestos has no further use and then orders the contractor to have it removed and discarded. The contractor has no independent discretion in this decision.

The regulation's reference to any person by site means that each site (in this case each ship) where a person generates waste is a separate generator and requires a separate EPA ID number.

However, for mobile sites, such as navy ships, the Department interprets the site as the navy port or navy fleet. Hazardous waste generator requirements are specified in 22 CAC Article 6, Sections 66470 through 66515.

Section 66472 requires an EPA ID number and Section 66480 requires preparation of a manifest for off-site transportation. It should be emphasized that these legal requirements can not be waived or modified by contractual agreements.

If the navy is not currently meeting the requirements discussed above, the navy is in violation of California law and subject to certain legal sanctions. In addition, contractors who assume generator responsibilities at the request or insistance of the navy are also in violation of California law and also subject to legal sanctions.

In conclusion, we note that this letter does not constitute the Department's complete legal opinion. The Department is in the process of preparing such an opinion on this issue with respect to a current enforcement action being taken by the San Diego District Attorney against the United States Navy in San Diego.

If you have any questions, please call me at 324-3752.

Sincerely,

Original signed by
John Masterman

John Masterman, Chief
RCRA Management Unit
Hazardous Waste Management Section

cc: James Allen, Chief, MCS
Angelo Bellomo, Chief, SCS
Dwight Hoenig, Chief, NCCS
David Leu, Chief, ATPDS
Caroline Cabias, Chief, HWMS

DEPARTMENT OF THE NAVY
SUPERVISOR OF SHIPBUILDING
CONVERSION AND REPAIR, USN
LONG BEACH, CALIFORNIA 90822

HW File

IN REPLY REFER TO:

4330
Ser 200-1003
3 June 1985

From: Supervisor of Shipbuilding, Conversion and Repair, U.S. Navy
To: Southwest Marine, Incorporated; Terminal Island, CA

Subj: USS RACINE (LST-1191) CLIN 0001, N00024-85-C-8508; HAZARDOUS Waste; disposal of

Ref: (a) SOUTHWEST MARINE, INC. ltr Serial No. 80-0841 of 21 May 1985

1. Reference (a) requested that the Government delete the requirements that all hazardous and extremely hazardous waste generated be designated "Contractor generated" in the contract for USS RACINE, CLIN 0001, N00024-85-C-8508.

2. When a Ship or Craft is in a contractor's facility, it is the Department of Navy's policy that all hazardous and extremely hazardous waste generated be designated "Contractor generated." Therefore, we do not have the authority to delete the requirements.

3. Your letter will be forwarded to NAVSEA Code 028 for information.

R. H. RANDALL

From R McK-7

X	FILE
X	GENERAL MGR.
X	ASST. GENERAL MGR.
X	CONTRACTS
	ESTIMATING
	SHIP SUPERINTENDENT
	QUALITY ASSURANCE
	PRODUCTION MGR.
	FINANCE
	OTHER
X	T. NOLAND
X	B. McKAY

RECEIVED
1985 JUN 11 A 8:21
SOUTHWEST MARINE, INC.
SAN PEDRO DIVISION

CRAIG

SHIP: USS CALLAGHAN (DDG-994)
COAR: 16-037
SWI File No: 077-01 NA
Revised: 08 Nov 1985

ITEM NO: 077-01-002(N)
PCN:
SURVEYOR: COLLET

1. SCOPE:

1.1 Title: Hazardous Waste Handling Procedures at Contractor's Facility; accomplish

1.2 Location of Work: Throughout the Ship

2. REFERENCES:

a. California Hazardous Waste Control Law, Health and Safety Code, Chapter 6.5

b. California Administrative Code, Title 22, Chapter 30; Minimum Standards for Management of Hazardous and Extremely Hazardous Waste

c. State of California Uniform Hazardous Waste Manifest Form No. DHS-8022 dated 11/82

3. REQUIREMENTS:

3.1 Consider hazardous and extremely hazardous waste removed from the ship while in the Contractor facility as "Contractor Generated".

3.2 Comply with the requirements of 2.a and 2.b.

3.2.1 The applicable definitions, including those of "Hazardous Waste" and "Extremely Hazardous Waste", are contained in 2.a and 2.b.

3.3 Accomplish the following prior to removal of waste from ship:

3.3.1 Identify all hazardous and extremely hazardous waste produced.

3.3.1.1 The analysis of any waste requiring the services of a testing laboratory shall be performed by a laboratory certified by the appropriate state agency to be competent and equipped to conduct the specific type of analyses to be performed.

3.3.2 Report the results of 3.3.1 by completing all blocks required to be filled in by "Generator" on 2.c.

3.3.2.1 The contractor is required by state law to have a Facility EPA Number. This number shall be included in the generator block.

3.3.2.2 Attach a copy of any report of a chemical analysis or other document evidencing identification of the hazardous or extremely hazardous waste.

SHIP: USS CALLAGHAN (DDG-994)

3.3.3 Notify the SUPERVISOR, Safety Officer, four hours prior to removing waste from ship during normal working hours and prior to noon of the last weekday prior to removing waste on backshifts, weekends, and holidays.

3.3.3.1 Submit one copy of completed 2.c to the SUPERVISOR, Attention: Safety Officer.

3.4 Ensure that transportation of hazardous or extremely hazardous waste is accomplished only by haulers registered to perform such transportation with cognizant state and federal agencies.

3.4.1 Disposal of hazardous or extremely hazardous waste shall be made only at facilities issued a state permit to dispose of such waste.

3.4.2 Dispose of hazardous waste.

3.5 Nothing in this job order shall relieve the contractor from complying with applicable federal, state and local laws, codes, ordinances and regulations, including the obtaining of licences and permits, in connection with hazardous material in the performance of this contract.

4. NOTES:

4.1 None

5. GOVERNMENT FURNISHED MATERIAL (GFM):

5.1 None

Please print or type. (Form designed for use on elite (12-pitch typewriter))

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No.: CAD982117254
Manifest Document No.: 11001 9
2. Page 1 of 1
Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
SOUTHWEST MARINE
FOOT OF SAMPSON ST., SAN DIEGO, CA 92113

4. Generator's Phone 619) 238-1000

A. State Manifest Document Number: 88400890
B. State Generator's ID: HAH0360125 23

5. Transporter 1 Company Name: ACTION CLEANING CORPORATION
6. US EPA ID Number: CAD982080666
C. State Transporter's ID: 409369
D. Transporter's Phone: (310) 233-1882

7. Transporter 2 Company Name: PETROLEUM RECYCLING CORP.
8. US EPA ID Number: CAT080011059
E. State Transporter's ID:
F. Transporter's Phone: (310) 595-1882

9. Designated Facility Name and Site Address
PETROLEUM RECYCLING CORP.
1635 E 29th STREET
SIGNAL HILL, CA 90806
10. US EPA ID Number: CAT080011059
G. State Facility's ID:
H. Facility's Phone: (310) 595-7431

11. US DOT Description (Including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
a. NON-RCRA HAZARDOUS WASTE LIQUID, N.O.S. (OIL WATER SEPARATION SLUDGE)	001	DM	1510	P	State 223 / EPA/Other NONE
b. NON-RCRA HAZARDOUS WASTE SOLID, N.O.S. (OIL CONTAMINATED RAGS & ABSORBENT MATERIAL)	002	DM	1410	P	State 223 / EPA/Other NONE
c.					State / EPA/Other
d.					State / EPA/Other

J. Additional Descriptions for Materials Listed Above
11a. SLUDGE (PETROLEUM SOLIDS, DIRT) 90-100%, WATER 0-10%, OIL 0-10%. 11b SOLID MATERIAL (RAGS, ABSORBENT) 90-99%, OIL 1-10%

K. Handling Codes for Wastes Listed Above
a. b. c. d.

15. Special Handling Instructions and Additional Information
WEAR PROTECTIVE EQUIPMENT. 24 HOUR EMERGENCY NUMBER 1-800-255-3924
EMERGENCY RESPONSE # 27
USS ESHMORE

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations.

If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

GENERATOR

Printed/Typed Name: DANIEL G MILLS
Signature:
Month Day Year: 11 12 17 88

TRANSPORTER

17. Transporter 1 Acknowledgement of Receipt of Materials
Printed/Typed Name: ARMANDO LONA
Signature:
Month Day Year: 11 01 21 7 88

18. Transporter 2 Acknowledgement of Receipt of Materials
Printed/Typed Name:
Signature:
Month Day Year:

FACILITY

19. Discrepancy Indication Space

20. Facility Owner or Operator Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19.
Printed/Typed Name:
Signature:
Month Day Year:

IN CASE OF AN EMERGENCY OR SPILL, CALL THE NATIONAL RESPONSE CENTER 1-800-424-8802; WITHIN CALIFORNIA CALL 1-800-852-7550

DHS 8022 A (1/88)
EPA 8700—22
(Rev. 9-88) Previous editions are obsolete.

Do Not Write Below This Line

Yellow: TSDF SENDS THIS COPY TO GENERATOR WITHIN 30 DAYS

CORPORATE HEADQUARTERS
Foot of Sampson Street • San Diego, California • 92113
P.O. Box 13308 • San Diego, California • 92170-3308
(619) 238-1000 • TWX: 910-335-1167 SWM SDG • FAX (619) 238-0934

SOUTH WEST

DATE:

MANIFEST:

TO WHOM IT MAY CONCERN:

THE ATTACHED HAZARDOUS WASTE MANIFEST HAS BEEN PREPARED AND SIGNED BY SOUTHWEST MARINE, INC., IDENTIFICATION NUMBER CAD981172554. HOWEVER, THE WASTE MATERIALS MANIFESTED WERE NOT GENERATED BY SOUTHWEST MARINE, INC., WHICH OTHERWISE HAS NO OWNERSHIP INTEREST IN OR RESPONSIBILITY FOR THE MANAGEMENT OF THOSE WASTES.

ALL WASTES IDENTIFIED ON THE MANIFEST WERE GENERATED BY THE UNITED STATES NAVY ONBOARD THE USS _____ WHILE THAT VESSEL WAS BERTHED OR DRY-DOCKED AT SOUTHWEST MARINE SHIPYARD IN SAN DIEGO, CALIFORNIA. THE UNITED STATES NAVY, HOWEVER, HAS REFUSED TO MANIFEST THESE WASTES IN VIOLATION OF ITS OBLIGATIONS UNDER RELEVANT FEDERAL, STATE OR LOCAL STATUTES, REGULATIONS OR ORDINANCES.

ACCORDINGLY, SOUTHWEST MARINE, INC. HAS MANIFESTED THE UNITED STATES NAVY'S WASTE FOR OFF-SITE TREATMENT, STORAGE, RECYCLING OR DISPOSAL FOR THE PURPOSE OF: (1) ASSURING THAT THE NAVY'S REFUSAL TO HANDLE ITS WASTES PROPERLY DOES NOT RESULT IN UNREASONABLE RISKS TO THE PUBLIC HEALTH OR ENVIRONMENT OR ANY FURTHER VIOLATION OF HAZARDOUS WASTE CONTROL LAWS; OR, (2) AVOIDING ERRONEOUS DEFAULT TERMINATIONS UNDER THE GOVERNMENT CONTRACT WORK WHICH GIVES RISE TO THE NEED FOR THIS MANIFEST. IN SO DOING, SOUTHWEST MARINE, INC. DOES NOT ADMIT RESPONSIBILITY OR LIABILITY FOR THE UNITED STATES NAVY'S WASTES, NOR DOES IT WAIVE ANY RIGHTS, OBJECTIONS OR DEFENSES IN ANY PROCEEDING WHATSOEVER WHICH MAY ARISE ON THE BASIS OF THESE WASTES OR THE U.S. NAVY'S REFUSAL TO MANIFEST OR OTHERWISE MANAGE THEM PROPERLY. UPON RESOLUTION OF THIS MATTER, AN AMENDED MANIFEST CONTAINING THE CORRECT UNITED STATES NAVY GENERATOR IDENTIFICATION NUMBER WILL BE SUBSTITUTED FOR THE ATTACHED MANIFEST.

ON BEHALF OF
SOUTHWEST MARINE, INC.
SAN DIEGO,

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
400 P STREET, 4TH FLOOR
SACRAMENTO, CA 95814

(916) 327-1184

March 18, 1992

State Board of Equalization
Attn: Mr. Herb L. Cohen,
Sr. Staff Counsel
Business Taxes Appeals Review Section
1020 N Street
P. O. Box 942879
Sacramento, California 94279-0001

IN THE MATTER OF THE PETITION OF:
Southwest Marine, Inc.
P. O. Box 13308
San Diego, CA 92170-0308

HG HQ 36-019852-001
HG HQ 36-019852-010
Generator Fee Period:
1/1/88 - 12/31/88

Dear Mr. Cohen:

Please find enclosed a copy of the Department of Toxic Substances Control's Prehearing Brief in the above-entitled matter. Please contact me if you have any questions.

Respectfully submitted,

JAMES R. CUTRIGHT
Acting Chief Counsel

Joan A. Markoff
Staff Attorney
Toxics Legal Office

cc: Southwest Marine, Inc.
P. O. Box 13308
San Diego, CA 92170-0308

W. Alan Lavtanen, Esq.
Gray, Cary, Ames & Fry
401 B Street, Suite 1700
San Diego, CA 92101

State Board of Equalization
Attn: Mr. Robert Frank
Environmental Fees Unit
2014 T Street, Suite 230
P. O. Box 942879
Sacramento, CA 94279-0001

(w/enclosure)

BEFORE THE

STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of:	FEE APPEAL
Southwest Marine, Inc. P.O. Box 13308 San Diego, CA 92170-0308	No. HG HQ 36-019852-001 No. HG HQ 36-019852-010
EPA ID No. CAD 981968027	PREHEARING BRIEF AND REPLY TO PETITION FOR REDETERMINATION AND CLAIM FOR REFUND
FISCAL PERIOD 1/1/88 - 12/31/88	

JAMES R. CUTRIGHT
Acting Chief Counsel
JOAN A. MARKOFF
Staff Attorney
Department of Toxic
Substances Control
400 P Street, 4th Floor
P.O. Box 806
Sacramento, California 95812-0806
(916) 322-5837

Attorneys for the
Department of
Toxic Substances Control

INTRODUCTION

In this brief the Department of Toxic Substances Control, ("Department") formerly a program within the Department of Health Services, responds to both a claim for refund of a generator fee and a petition for redetermination of fees filed by Southwest Marine, Inc. ("Petitioner"). Because both the claim for refund and the petition are based on identical facts and present the same legal issues, the Board consolidated the two cases for hearing.

Petitioner's claim for refund is based on the belief that the assessed generator fee for the fiscal period of January 1, 1988, to December 31, 1988, should have been in the amount of $242.50 instead of the $10,210.00 which was actually assessed. Petitioner's petition for redetermination challenges the Board of Equalization's ("Board") September 9, 1991, determination that assessed an additional $50,136.76 in generator fees for the same fiscal period.

STATEMENT OF CASE

On January 25, 1989, Petitioner filed the annual generator return for the calendar year 1988 with their remittance of $10,210.00 reporting that they manifested between 250 and 499.9 (category 5) tons of hazardous wastes. On December 27, 1989, Petitioner filed a claim for refund of $9,968.00 of the $10,210.00 1988 generator fee, asserting that it incorrectly paid fees to the Board which should have properly been paid by the United States Navy ("Navy"). Petitioner asserted that it was

liable for only 24.47 tons of the waste generated and the remaining 2,633.77 tons was generated by the Navy. Petitioner submitted worksheets which it alleged would track which waste had been generated by the Navy as opposed to Petitioner.

The Board's subsequent review of the worksheets provided by Petitioner indicated that Petitioner manifested 2594 tons of hazardous waste in 1988. The Board's separate review of Department records disclosed that, contrary to what was reflected in Petitioner's log, Petitioner had in fact manifested 2,761 tons of hazardous waste in 1988. In either case, the appropriate category would be more than 2,000 tons (category 8) of hazardous waste, instead of the 250 to 499.9 tons for which Petitioner paid $10,210. Consequently, the Board denied Petitioner's claim for refund and subsequently issued a second determination for $50,136.76 ($36,375.00 in fees and $13,761.76 in interest) on September 9, 1991.[1]

On October 8, 1991, Petitioner filed a petition for redetermination of the September 9, 1991, determination. Again, because the issues presented by the claim for refund and petition for redetermination are the same, at that time the Board informed Petitioner that the matters would be consolidated for hearing.

Factual Background

Petitioner is a marine contractor specializing in the

[1]The amount consists of additional Generator Fee of $36,375 and interest of $13,761.76. The appropriate Generator Fee for generating over 2,000 tons of hazardous waste during the 1988 calendar year is $48,500. Petitioner had already paid $12,125.

repair, modernization and maintenance of seagoing vessels. Petitioner contracts with the Navy to clean and repair Navy ships at Petitioner's San Diego site.

The reported waste at issue is primarily comprised of contaminated oil and water that Petitioner removes from the bilges of Navy ships at its San Diego site. Approximately 50% of the contaminated bilge water is water used by the ships in the engine compartment and cooling systems. The remaining 50% of the water is introduced by Petitioner during repair and cleaning work performed by Petitioner. All of this contaminated bilge water is transported by hose to a transportable treatment unit that uses gravity separators to remove the hazardous materials from the water. Petitioner sends the remaining residues or filter cake from the treatment process to a recycler. These residues represent about 5% of the total contaminated water removed from the ship. It is this 5%, and only this 5% of the waste, for which Petitioner admits liability.

Navy contracts between Petitioner and the Navy identify Petitioner as the generator of the bilge water waste stream, as well as other waste streams generated by the contractor; i.e., paint chips, solvents, asbestos, etc. In addition, Petitioner manifests all the waste removed from the Navy ships under Petitioner's own EPA identification number.

Petitioner attaches a separate document to each manifest of waste removed from a Navy vessel which states that the Navy, and not Petitioner, is the generator of the waste and that Petitioner

is manifesting the waste under its own EPA identification number because the Navy has refused to do so. Petitioner has maintained records of each shipment of hazardous waste from the site, and claims that it can specifically identify which waste is generated by the Navy and which waste is generated by Petitioner.

As was stated above, in spite of the contracts and the manifests which indicate otherwise, Petitioner contends that it owes fees only on the residue portion of the waste (5%) which is recycled, rather than the total amount of hazardous waste removed from each ship. Petitioner argues that it is the Navy who is financially liable for the bulk of the wastes removed from the ships.

ARGUMENT

I.

WHERE TWO OR MORE PARTIES CONSTITUTE CO-GENERATORS, THE PARTIES MAY AGREE AMONG THEMSELVES WHO WILL UNDERTAKE THE GENERATOR DUTIES.

California Health and Safety Code[2] sections 25205.1 through 25225.9, provide that fees shall be assessed against generators of hazardous wastes. During the fiscal period of 1988, section 25205.1(e) defined "Generator" as a "person who generates volumes of hazardous waste on or after July 1, 1988, in those amounts specified in subdivision (b) of section 25205.5 at an individual site commencing on or after July 1, 1988. . . ."

Title 22, California Code of Regulations (Cal. Code Regs.),

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[2] Unless otherwise specified, all section references are to the Health and Safety Code.

then section 66078 [now section 66260.10] provides that "'Generator' means any person, by site, whose act or process produces hazardous waste identified or listed in Article 9 or 11 of this chapter or whose act first causes a hazardous waste to become subject to regulation."

Chapter 11 of Division 4.5 of the California Code of Regulations lists waste oil and mixed oil as a hazardous waste. See, Appendix XII to Cal. Code Regs., section 66261.126. The bilge water removed by Petitioner from the Navy ships was contaminated with waste oil as well as some asbestos.

California's statute and regulations were patterned after similar federal statutes. (See 40 CFR 260.10 defining "generator.") Both the state and federal regulations define "generator" very broadly in order to make as many parties as possible liable as generators, thus ensuring compliance with the regulations concerning the transport, management and disposal of hazardous waste.

Under this broad definition, both the Navy and the contractor who removes the hazardous waste are generators. The ownership of a vessel which contains and produces hazardous waste causes the Navy to be a generator within the meaning of section 66078.[3] In addition, the contractor who removes the waste,

---

[3]It should be noted that it is the Board and Department's position that, under applicable California precedent, the waste on the ship is not subject to regulation within the meaning of Section 66078 until it is removed from the ship. Accordingly, the Navy is a generator by virtue of the fact that it owns the ship which produces the waste. However, the waste itself is not subject to regulation within the meaning of Section 66078 until it is removed

first causes the waste to become subject to regulation, and thus also is a generator. Clearly, this definition of generator includes both the Navy and the Petitioner. As such, both parties are jointly and severally liable as generators.

In 1980, The federal Environmental Protection Agency (EPA) addressed the issue of more than one party being responsible for a hazardous waste's generation by introducing the concept of "co-generators". If more than one party plays a role in the generation of a hazardous waste at a site, the parties are "co-generators" and must decide between themselves who is to assume the generator responsibilities.[4]

In 45 Fed. Reg. 72024, 72026 (October 30, 1980) the EPA stated:

> "[T]he Agency [. . .] recommends that, where two or more parties are involved, they should mutually agree to have one party perform the generator duties. Where this is done, the Agency will look to that designated party to perform the generator responsibilities. Nevertheless, EPA reserves the right to enforce against any and all persons who fit the definition of 'generator' in a particular case . . ."

---

from the ship. See, In re Santa Clara Ranches, HG HQ 36-026193-010, memorandum opinion issued on November 6, 1990, upheld by vote of the full Board of Equalization on December 10, 1991. A copy of the decision is attached as Exhibit "A" and is incorporated herein by this reference.

[4]It is well established that considerable weight should be accorded to the interpretation of a statute given by the agency charged with its administration. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845, 104 S.Ct 2778, 2781-82 (1984). Moreover, where the provisions in the federal and state law are similar, federal interpretations are persuasive in determining how the state law is to be applied. Coast Oyster Co. v. Perluss (1963) 218 Cal.App.2d 492, 498.

Thus, any one of the parties can assume and perform the duties of the generator on behalf of all the parties.[5] The duties of the generator necessarily include paying any taxes that attach by virtue of assuming the duties of generator.

As such, the Department can attempt to collect fees from either the Navy or the Petitioner as both are liable as generators of the hazardous waste at issue in the instant case. Given the fact that both the Navy and Petitioner are joint and severally liable, the question then becomes, did the parties mutually agree that one party would undertake the duties of being the generator?[6] The following section establishes that the parties did indeed enter into such an agreement.

II.

WHERE THE PARTIES MUTUALLY AGREED THAT PETITIONER WOULD UNDERTAKE THE DUTIES OF THE GENERATOR AND PETITIONER MANIFESTS THE WASTES UNDER ITS OWN EPA NUMBER, PETITIONER IS LIABLE FOR THE GENERATOR FEE.

Petitioner performs repair and cleaning of Navy ships under contract with the Navy. The Navy has a Master Ship Repair Agreement with Petitioner that sets forth certain terms and

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[5]See Exhibit "B", letter from U.S. EPA to Vice Admiral P.M. Hekman, Jr., dated December 3, 1990, wherein the EPA reiterated its position regarding co-generators and the assumption of generator duties. Exhibit "B" is attached to this brief and is incorporated herein by this reference.

[6]The Department would note that once it has established that it can lawfully collect from either the Navy or Petitioner and that the parties mutually agreed that Petitioner would undertake the generator duties, the issue of whether or not the contract is enforceable is a separate contract dispute between the Navy and Petitioner and is not an issue which should be litigated in front of the Board.

conditions governing work performed by Petitioner. The Navy then issues individual and specific job orders for the actual work to be performed on each ship. During the calendar year 1988, Petitioner entered into a number of job orders with the Navy for the maintenance and repair of various Navy ships. All of these job orders included a contract clause entitled "Disposal of Hazardous Wastes" which was developed to provide the contractual coverage in ship repair contracts for the determination of liability and responsibility.[7] This clause provided that where hazardous wastes were generated by either party during the performance of a job order performed at a facility owned or leased by the contractor, the contractor would dispose of the wastes, use its generator number and perform all generator responsibilities required under the Resource Conservation and Recovery Act (RCRA). The clause further provided that where the work is performed at a government-owned facility, a Navy generator number would be used. In the latter situation, responsibility for the disposal of the wastes would be established in the job order.

The job orders also contained a Standard Work Item which provided for the identification, removal, handling, storage, transportation and disposal of hazardous waste in ship repair contracts. The Standard Work Item in 1988 provided that the contractor would dispose of hazardous waste generated by either

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[7]See attached Exhibit "C" which is incorporated herein by this reference.

party during the performance of the job order, perform all generator duties under RCRA, fill out all blocks required to be completed by the generator on applicable hazardous waste manifest forms and include the contractor's generator number of the site where the work is being performed in the generator block.

Again, both the Board and the Department construe section 66078 consistent with federal guidance. As the federal EPA has stated, where more than one party is liable as a generator, the Department will look to the party identified by mutual agreement between the parties to undertake the duties of the generator. This construction is entitled to great weight (Chevron U.S.A., Inc., supra, 467 U.S. 837.)

In this instance, Petitioner repeatedly entered a contract in which it agreed to undertake the duties of, and be identified as, the generator. As such, Petitioner is liable for the generator fees.[8]

Additionally, Petitioner identified itself as the generator of waste totaling over 2,500 tons, on 191 uniform hazardous waste manifests during the calendar year 1988. Petitioner manifested all the waste under its own EPA number. This is further evidence of Petitioner's intent to be identified as the generator, and the parties agreement to that end.

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[8]The Department would note that the disclaimer which Petitioner attaches to each manifest is evidence of an admission by Petitioner that the parties mutually agreed that Petitioner would undertake the duties of generator. Whether or not a contract which shifts generator duties from one party to another is enforceable, is a separate dispute which exists between the parties to the contract.

III.

PETITIONER IS LIABLE FOR THE GENERATOR FEE BECAUSE ITS ACT OF REMOVING THE BILGE WATER FIRST CAUSED THE HAZARDOUS WASTE TO BECOME SUBJECT TO REGULATION.

As was stated above, Title 22, Cal. Code Regs., section 66708 provided that "Generator" means any person by site, whose act or process produces hazardous waste [. . .] or whose act first causes a hazardous waste to become subject to regulation." (Emphasis added.)

The analysis set forth in the Board of Equalization's recent decision in In re Santa Clara Ranches, No. HG HQ 36-026193-010, is applicable in the instant case. In that case the Board held that for the purpose of calculation of the generator fee pursuant to section 25205.1, the act of excavating and manifesting contaminated soil is the act which first causes the hazardous waste to become subject to regulation. The Board held:

> Thus for the purpose of the generator fee calculation, the petitioner became a generator when the hazardous waste was removed from its point of origin and manifested because it is at that time the waste became subject to regulation. Petitioner's act of excavating and manifesting the contaminated soil was the act which first caused the hazardous waste to become subject to regulation.[9] (Emphasis added.)

The Board further held: "It is not the leaking of the contaminant into the soil, but rather the management of the soil after excavation which incurs state cost."[10] Similarly, it is not the presence of bilge water in the ships, but rather the

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[9] In re Santa Clara Ranches, No. HG HQ 36-026193-010, at p. 3.

[10] Id. at p. 3.

removal by the contractor which begins the process which incurs State cost in the form of regulation of the waste, its transportation, and finally its disposal or treatment.

In previous letters to the Board, Petitioner has asserted that it did not first subject the waste to regulation because the bilge water was already a waste while it was on the ship. In California, however, consistent with the reasoning of Santa Clara Ranches, the fact that the bilge water may have already been waste before it was removed from the ship, does not necessarily mean that it was subject to regulation within Section 66078. As was stated above, in California, it is the act of removing the waste which first subjects it to regulation within the meaning of Section 66078. The waste is not regulated within the meaning of Section 66078, until is removed from the ship.[11]

Accordingly, in the instant case, it was the Petitioner's act of removal of the bilge water which "generated" the waste, which then become subject to regulation, requiring its proper handling. As such, the Petitioner is liable for the assessed fees.

CONCLUSION

The Department respectfully submits that Petitioner was properly assessed the generator fees for the fiscal period of

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[11]The Navy is a generator by virtue of the fact that it owns the ship on which the waste was produced. Liability as a generator attaches by virtue of this production of waste, however, the waste is not subject to regulation within the meaning of the California Regulation until it is removed.

January 1, 1988, to December 31, 1988, in the amount of $10,210.00. The subsequent determination which assessed an additional $50,136.76 in generator fees for the same fiscal period was also proper. Under applicable state and federal law, the Petitioner has joint and several liability for the waste which was removed from the Naval ships it repaired. The Petitioner performed the work under a contract with the Navy, by which the parties mutually agreed that Petitioner would undertake the duties of the generator. As such petitioner is liable for all assessed fees. For the reasons discussed above, Petitioner's Claim for Refund and Request for Determination should be denied.

DATED: 3/18/92

Respectfully submitted,

JAMES R. CUTRIGHT
Acting Chief Counsel

JOAN A. MARKOFF
Staff Counsel
Toxics Legal Office

Attorneys for
Department of
Toxic Substances Control

EXHIBIT A

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Petition of	)	
	)	
SANTA CLARA RANCHES	)	NO. HG HQ 36-026193-010
	)	
For Redetermination Under the Hazardous Substances Tax Law	)	
	)	

Appearances:

For Petitioner:	J.W. Gibbons President
For Department of Health Services:	Bryce Caughey Staff Attorney
For Department of Special Taxes & Operations, State Board of Equalization:	E.V. Anderson Special Taxes Administrator
	Janet Vining Staff Counsel

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination of a Hazardous Waste Generator Fee in the amount of $10,780 which was heard and taken under consideration by the Board on August 13, 1991 in Torrance, California.

Petitioner owns real property which was contaminated over a number of years by a leaking gasoline tank located on the property. Petitioner was held responsible as the generator for the generator fee imposed for the subsequent removal and disposal of the contaminated soil.

The period of liability in this case was July 1, 1987 through June 30, 1988. The fee was based on the removal of over 480 tons of contaminated soil from the site in fiscal year 1987-1988. The applicable generator fee category was 250 to 2,499.9 tons. (Health and Safety Code section 25205.5(b)(5).)

The issues raised by the petition are:

(1) For purposes of the fee imposed on generators of hazardous waste by Health and Safety Code section 25205.5, is the waste generated at the time of removal of the contaminated soil constituting the waste, or over the time period during which the contamination occurs.

(2) Was the fee schedule for fiscal year 1987-1988 arbitrary, irrational, and discriminatory.

Petitioner argues that the hazardous waste which resulted from the gasoline which leaked into the soil was not generated in fiscal year 1987-1988; rather, it was generated as the leakage of gasoline occurred over a number of years. The Department of Health Services (now the Department of Toxic Substance Control) contends that waste was generated when the contaminated soil was excavated, and the volumes of waste excavated determined the amount of the generator fee.

Health and Safety Code, Chapter 6.5 (commencing with § 25100) of Division 20, provides generally for the control of hazardous waste, and delegates to the Department the authority to promulgate regulations for the enforcement of the provisions of the code. (See §§ 25141 and 25150 of the Health and Safety Code.) Pursuant to that authority, the Department has promulgated extensive regulations in Title 22 of the California Code of Regulations (CCR).

Article 9 of Title 22 lists wastes and materials the Department has determined to be hazardous (including gasoline; § 66680(d)). In addition, Article 11 of Title 22 sets forth criteria to be used in determining whether a waste is hazardous. Section 66680 mandates that any waste which is listed in Article 9, or which satisfies any of the criteria of hazardous waste presented in Article 11, must be handled in accordance with the Department's regulations.

When petitioner in this case excavated the contaminated soil, petitioner produced waste within the meaning of Health and Safety Code sections 25120 and 25124. Under Title 22, CCR section 66305, it is the waste producer's responsibility to determine if the waste is to be classified as hazardous waste pursuant to Article 9 and Article 11 of Title 22. Once classified as hazardous by the producer, the waste must be managed pursuant to the Department's regulations. Thus, when the petitioner in this case excavated the contaminated soil, classified it as hazardous and reported it to the Department on a hazardous waste manifest, as required under

Title 22, CCR Section 66480, the petitioner became a regulated generator. Pursuant to Health and Safety Code section 25205.5(b), a regulated generator is required to pay the fee for the amount of waste generated.

Health and Safety Code section 25205.1(f) defined a "generator" in fiscal year 1987-1988, "as a person who generates volumes of hazardous waste on or after July 1, 1986.-..." Title 22, CCR section 66078 defines "generator" as "... any person, by site, ... whose act first causes a hazardous waste to become subject to regulation." (Emphasis added.) Thus, for the purpose of the generator fee calculation, the petitioner became a generator when the hazardous waste was removed from its point of origin and manifested because it is at that time that the waste became subject to regulation. Petitioner's act of excavating and manifesting the contaminated soil was the act which first caused the hazardous waste to become subject to regulation. The statutory and regulatory scheme support the Department's contention that petitioner became a generator in this case when the waste was excavated. It is to be noted that the purpose of the fee is to provide funds for regulation by the State. Accordingly, the law provides that the act which causes regulation to begin is the act which is subject to the fee. It is not the leaking of the contaminant into the soil, but rather the management of the soil after excavation which incurs State cost.

The position that generation takes place when the contaminated soil was removed and not over the period when the contamination occurred, is consistent with 40 CFR section 264.114 which provides that a person removing waste during the closure of a hazardous waste management unit becomes a "generator" of hazardous waste.

The Board finds that hazardous waste was generated within the meaning of Health and Safety Code sections 25205.1 and 25205.5 at the time petitioner excavated and manifested the contaminated soil which constitutes the hazardous waste. Petitioner was a generator and was therefore required to pay the fee pursuant to Health and Safety Code section 25205.5(b) for the amount of waste generated in fiscal year 1987-1988.

Petitioner contends that the fee schedule for the fiscal year 1987-1988 was arbitrary, irrational, and discriminatory. Petitioner states the fee schedule favors the large-scale, ongoing producers of hazardous waste to the disadvantage of the one-time small generator.

The fee schedule established by the Legislature is based on the generation of the amount of waste over an annual period. If a

small company generates the same amount of waste at a site as a large company under the fee schedule, they both pay the same fee for that period regardless of the company's size. Therefore, any generator of waste which comes within a specific fee category will pay the corresponding fee under the law relevant to fiscal year 1987-1988.

A legislative act would be required to amend the law to address petitioner's concern. An administrative agency has no power to declare a statute unenforceable, or refuse to enforce a statute, on the grounds of unconstitutionality unless an appellate court has made a final determination that such statute is unconstitutional under section 3.5 of Article III of the California Constitution. The fee schedule under Health and Safety Code section 25205.5 has not been held unconstitutional by an appellate court; therefore, the administrative agencies charged with the enforcement of the statute may not refuse to enforce it.

For the reasons expressed in this opinion, the petition for redetermination in the amount of $10,780 is redetermined without adjustment.

Done at Sacramento, California, this _____ day of _____ 1991.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

Attested by _____, Executive Director

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 3 1990

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

Vice Admiral P.M. Hekman, Jr.
Department of the Navy
Naval Sea Systems Command
Washington, D.C. 20362-5101

Dear Admiral Hekman:

Thank you for your letter of November 7, 1990, regarding the Fiscal Year 1990 Defense Authorization Act and its impact on the Navy's hazardous waste handling procedures. Last summer, my staff became aware of the issues mentioned in your letter, and they have been investigating how the new legislation affects the Solid Waste Disposal Act.

The legislation at 10 U.S.C. 7311 puts a certain burden on the Navy and its contractors to obtain separate "generator identification numbers" in order to document which party generated a hazardous waste during the repair of a ship. Section 7311(a)(4)(B) specifically states:

> A determination under this paragraph of whether the Navy is a generator, a contractor is a generator, or both the Navy and a contractor are generators, shall be made in the same manner provided under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) and regulations promulgated under that subtitle.

Under the federal hazardous waste regulations, a "generator" is defined in 40 CFR 260.10 as "... any person, by site, whose act or process produces hazardous waste ... or whose act first causes a hazardous waste to become subject to regulation." EPA interprets the act of owning a vessel such as a Navy ship to cause the Navy to be a generator of hazardous wastes that are produced during the repair of the ship; in addition, a contractor actually conducting the repair is also a generator. In 1980, EPA addressed the issue of more than one party being responsible for a hazardous waste's generation by introducing the concept of "co-generators." If more than one party plays a role in the generation of a hazardous waste at a site, the parties are "co-generators" and must decide between themselves who is to assume the generator responsibilities. See the discussion in the enclosed Federal Register notice.

One of the generator's requirements is to obtain an EPA identification number (see the requirement in 40 CFR 262.12). Since a generator is defined as a "person, by site," the person generating hazardous wastes at a given site must obtain an EPA identification number for that site.

EPA's data management system for hazardous waste generators, transporters, and treatment, storage, and disposal facilities is set up to assign only one EPA identification number per unique site. To assign more than one number to a unique site raises certain issues that EPA is still investigating. However, EPA's Office of Solid Waste will be rethinking the entire ID number assignment issue within the next eighteen months. Currently, the EPA regions and authorized states are responsible for assigning the numbers, and may make their own determinations of how to assign numbers at port facilities.

Assuming only one EPA identification number is issued to a port where a contractor is repairing a Navy ship, both the Navy and its contractor may use that EPA identification number in completing Box 1 of the Uniform Hazardous Waste Manifest. Note that nothing in the hazardous waste regulations prevents a generator, such as the U.S. Navy, from assigning its own tracking numbers on manifests in order to identify a particular contractor who was involved in generating the hazardous waste in that shipment (or, similarly, assigning tracking numbers that relate a particular hazardous waste shipment to a given ship or port of origin). Such "internal" tracking numbers could be placed in Box 15 of the Uniform Hazardous Waste Manifest.

Please be aware that this response reflects the federal hazardous waste regulations. States may impose their own requirements that are stricter or broader than the federal requirements. If you have further questions on this issue, please have your staff contact Becky Cuthbertson of my staff at (202) 475-8551.

Sincerely yours,

/s/

Don R. Clay
Assistant Administrator

Enclosure

EXHIBIT C

DISPOSAL OF HAZARDOUS WASTES

The disposal of hazardous wastes by the contractor shall be in accordance with the Resource Conservation and Recovery Act (RCRA) and all other applicable Federal, State and local laws, codes, ordinances and regulations.

Where hazardous wastes are generated by either party during the period of performance of a Job Order (relating to the repair/overhaul of a Naval vessel) performed at a facility owned, leased (including the lease of a Navy facility), or otherwise under the control of the contractor or a subcontractor, the contractor shall dispose of such wastes, use its generator number and perform all generator responsibilities required under RCRA. Where the work is performed at a government-owned facility (other than a facility leased to the contractor), a Navy generator number shall be used. In this latter situation, responsibility for the actual disposal of the wastes will be established in the Job Order.

The Navy and the contractor hereby acknowledge their respective liabilities for the disposal of hazardous wastes as established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and RCRA. Disposal of hazardous wastes by either party shall not serve to relieve the party not disposing of the wastes of liability imposed by CERCLA or RCRA for the generation of hazardous waste. Where the contractor disposes of hazardous wastes that are generated solely by Navy personnel, compliance with applicable Federal, State, and local laws, codes, ordinances and regulations will relieve the contractor of any liability under CERCLA and RCRA. The contractor is not relieved of liability where it disposes of mixed Navy-contractor generated hazardous wastes or wastes generated solely by contractor (including subcontractor) personnel. Disposal of hazardous wastes by the Navy shall not relieve the contractor of its liability under CERCLA or RCRA for hazardous wastes that are generated solely by the contractor and its share of liability for mixed Navy-contractor generated hazardous wastes. Nothing contained herein shall serve to establish CERCLA liability.

GRAY, CARY, AMES & FRYE

GORDON GRAY (1877-1967)
W. P. CARY (1882-1943)
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April 8, 1992

VIA U.S. EXPRESS MAIL

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Senior Staff Counsel
State Board of Equalization
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Sacramento, California 94279-001

Re: Southwest Marine, Inc.
Case Numbers HG HQ 36-019852-001
and HG HQ 36-019852-010

Ladies and Gentlemen:

Enclosed is a copy of a Statement of Position in Response to Prehearing Brief and Reply to Petition for Redetermination and Claim for Refund filed on behalf of Southwest Marine, Inc. in the above-referenced case numbers.

Very truly yours,

W. Alan Lautanen
For
GRAY, CARY, AMES & FRYE

WAL:lmc
20242876
Enclosures
cc: Robert A. White, Esq.
Mr. Dana M. Austin

BEFORE THE

STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of:	)	FEE APPEAL
	)	
Southwest Marine, Inc. P.O. Box 13308 San Diego, CA 92170-0308	)	No. HG HQ 36-019852-001 No. HG HQ 36-019852-010
	)	
EPA ID No. CAD 981968027	)	STATEMENT OF POSITION IN RESPONSE TO PREHEARING BRIEF AND REPLY TO PETITION FOR REDETERMINATION AND CLAIM FOR REFUND
	)	
FISCAL PERIOD 1/1/88 - 12/31/88	)	
	)	

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Attorneys for Southwest Marine, Inc.

I

INTRODUCTION

This Statement of Position is submitted by Southwest Marine, Inc. ("Petitioner") in response to the Prehearing Brief and Reply to Petition for Redetermination and Claim for Refund (the "Brief") submitted by the Department of Toxic Substances Control (the "Department").

II

FACTS

Before addressing the arguments made by the Department, Petitioner wishes to correct and clarify certain facts surrounding this case.

In its Brief, the Department states that, "[a]pproximately 50% of the contaminated bilge water is water used by the ships in the engine compartment and cooling systems. The remaining 50% of the water is introduced by Petitioner during repair and cleaning work . . . ." These percentages have no basis in fact. Petitioner estimates that only 10 percent of the contaminated water is introduced by Petitioner during cleaning.

In its Brief, the Department also sets forth the following asserted facts:

> "All of this contaminated bilge water is transported by hose to a transportable treatment unit that uses gravity separators to remove the hazardous materials from the water. Petitioner sends the remaining residues or filter cake from the treatment process to a recycler. These residues represent about 5% of the total contaminated water removed from the ship. It is this 5%, and only this 5% of the waste, for which Petitioner admits liability."

This statement simply is not true. Petitioner has not admitted, and does not admit, liability for the five percent of the waste described above.

The only hazardous waste attributable to the United States Navy ("Navy") ships for which Petitioner admits it is the generator is the hazardous waste produced in Petitioner's sandblasting process. Petitioner routinely sandblasts the exterior of the Navy ships in order to remove paint. Petitioner manifests the sandblasted waste as its own.

Finally, during the fiscal period from January 1, 1988 through December 31, 1988, only one of the Navy ships which Petitioner serviced was a "product transport vessel" (i.e., oiler).

III

DISCUSSION

1. Regulations Which Support the Imposition of Co-Generator Liability Are Not Applicable to Petitioner.

In its Brief, the Department relies heavily upon regulations promulgated by the Environmental Protection Agency ("EPA") which provide for the concept of co-generators of hazardous waste. Based upon these EPA regulations (40 C.F.R. 260.10 et seq.), the Department concludes that both the Navy and Petitioner are generators with respect to the hazardous waste in question and are therefore both potentially liable for the hazardous waste generator fee under California Health & Safety Code ("H&S Code") Sections 25205.1 through 25205.9. The Department's conclusion cannot stand because the regulatory

authorities upon which it relies are inapplicable to Petitioner, except with respect to the single Navy oiler serviced in 1988.

On October 30, 1980, the EPA promulgated proposed amendments to its regulations at 40 C.F.R. 260.10 et seq. These amendments addressed hazardous waste generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel or a manufacturing process unit, and were promulgated in response to industry protest over the EPA regulation of hazardous waste materials contained in these types of storage tanks, transport vessels or units. Under these amendments, hazardous waste produced in product or raw material storage tanks, product or raw material transport vehicles or vessels or manufacturing process units is not subject to regulation until removed. 40 C.F.R. 261.4(c). In promulgating the amendments, the EPA observed as follows:

> ". . . EPA did not intend to regulate product and raw material storage tanks, transport vehicles and vessels or manufacturing process units in which hazardous wastes are generated. . . . Because of their design and operation, these units are capable of holding, and are typically operated to hold, the hazardous wastes which are generated in them, until the wastes are purposefully removed. Thus, these hazardous wastes are contained against release into the environment . . . and the only risks they pose to human health or the environment are very low and are only incidental to the risks posed by the valuable product or raw material with which they are associated." See 45 Federal Register 72024.

The EPA then went on to observe that in the case of storage or transportation, there is more than one generator:

> ". . . the operator of a manufacturing process unit or a product or raw material

> storage tank, transport vehicle or vessel is a generator of hazardous waste because it is his 'act' of storage or transportation . . . that produces the hazardous waste. . . . The owner[s] of the product or raw material being stored or transported . . . also fit the definition of 'generator' of the hazardous waste because their 'acts' cause the product or material to be stored, transported or manufactured which leads to the generation of the hazardous waste. . . . The definition of generator . . . also fits the person removing the hazardous waste from a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel . . . [because] it is his act which causes the hazardous waste to become subject to regulation . . ..
>
> Because all three parties contribute to the generation of the hazardous waste and because none of the parties stands out in all cases as the predominant contributor, the Agency has concluded that the three parties should be jointly and severally liable as generators." (Emphasis added.) Id.

It is this EPA regulatory action, and the EPA's accompanying discussion at 45 Federal Register 72024 et seq., on which the Department relies to conclude that Petitioner is a "co-generator."

The EPA regulatory amendment discussed above applies only to raw material or product transport vessels. The reason that the regulation is limited to such vessels is because those vessels are uniquely constructed to hold hazardous waste. Accordingly, the EPA believed it was safe to exempt the hazardous waste contained in such vessels from regulation until the waste was physically removed from the vessel. Delaying regulation of the hazardous material until it is removed from the raw material or product transport vessel is what enables the EPA to include the contractor removing the waste within the definition of

generator as it is the removal by the contractor which causes the waste to be subject to regulation.

It is clear from the EPA regulation that the exemption from regulation of hazardous waste in vessels does not extend to vessels which are not raw material or transport vessels. Accordingly, a ship or vessel which produces hazardous waste and which is not a raw material or product transport vessel (such as a Navy warship) would be subject to regulation from the moment the hazardous material is generated. Under 40 CFR Section 260.10, "generator" is defined as any person, by site, whose act or process produces hazardous waste or whose act first causes the hazardous waste to become subject to regulation. In the case of a vessel which is not a raw material or product transport vessel, and which produces hazardous waste, the owner/operator of that vessel is the generator.

As stated above, only one Navy ship which was serviced by Petitioner during 1988 was a raw material or product transport vessel. Accordingly, only this single Navy vessel serviced by Petitioner is covered by the EPA rule which exempts hazardous waste from regulation until removal from the vessel. Under EPA regulations, the hazardous waste produced in all other Navy ships was subject to regulation from the moment produced. Because Petitioner had absolutely no involvement with the waste when it was produced in these other Navy ships, and because it was the Navy's act which first caused the hazardous waste to be produced and subjected to regulation, it is the Navy, and not

Petitioner, who is the generator of the waste in question. Petitioner is not a co-generator of the waste.

The Department also attaches to its Brief a copy of a letter from the EPA to Vice Admiral P. M. Hekman, Jr., of the Navy. First, this letter, which is not addressed to the Department or Petitioner, has no precedential impact and is of no probative value in resolving the issues raised in this case. Moreover, the EPA letter was written in response to a letter from Vice Admiral Heckman (Exhibit A) in which he seeks the EPA's assistance in implementing the proper procedures for obtaining hazardous waste identification numbers. This inquiry has no bearing on the issues raised by Petitioner's case. Finally, the enclosures referenced in the EPA's letter are not included with the copy of the EPA's letter attached to the Department's Brief; however, the enclosure is attached hereto as Exhibit B. The enclosure is the EPA regulatory amendment discussed at length above. To the extent the EPA letter relies upon that EPA regulatory amendment, the letter is inapplicable to Petitioner's case.

2. <u>The Contracts Between the Navy and Petitioner Do Not Give Rise to Liability for the Generator Fee</u>.

The Department, in its Brief, concludes that Petitioner is liable for the generator fee because of contractual agreements entered into between Petitioner and the Navy which stated that Petitioner would be responsible for manifesting and removing hazardous waste.

In making its argument, the Department once again relies upon the EPA regulation discussed above which states that where there are co-generators, and the parties have agreed to identify one person to be the generator, that person will be liable as generator.

As emphasized above, the EPA regulation on co-generators is inapplicable to Petitioner, except with respect to the single Navy oiler serviced in 1988. Petitioner is not a co-generator because Petitioner does not fall within the EPA rule. Accordingly, the regulation cannot be relied upon to impose co-generator fee liability on the Petitioner on the basis of any agreement between Petitioner and the Navy.

Even if for some reason it is proper to examine the contracts entered into between Petitioner and the Navy, Exhibit C to the Department's Brief does not conclusively impose liability for the generator fee on Petitioner. As can be observed from a plain reading of the Department's Exhibit C, the contract specifically allocates to Petitioner only responsibility for (a) disposing of such wastes, (b) using its generator number and (c) performing generator responsibilities required under the Resource Conservation and Recovery Act. The contract does not allocate to Petitioner responsibility for the generator fee under H&S Code Sections 25205.1 through 25205.9.

3. Santa Clara Does Not Resolve the Issues of This Case.

Finally, in its Brief, the Department relies upon a State Board of Equalization ("SBE") decision entitled In the

Matter of the Petition of Santa Clara Ranches. Santa Clara is distinguishable from Petitioner's case for several reasons.

First, Santa Clara held that contaminated soil is not hazardous waste and does not become subject to regulation until it is removed from the ground. This conclusion is entirely consistent with H&S Code Section 25117 which defines "hazardous waste" as a waste which meets certain requirements of being harmful. Waste is defined as a discarded, relinquished, recycled, accumulated or stored material. H&S Code Section 25124; see also, Cal. Admin. Code Section 66261.2. Soil, by its nature, cannot be waste until it is removed from the ground; until its removal, it serves a useful purpose. In contrast, contaminated bilge water in the Navy ship is waste from the moment produced; it serves no useful purpose. The bilge water does not have to be removed from the Navy ships in order to be considered waste. Accordingly, the waste in Santa Clara differs vastly from the waste in this case, and the SBE's conclusions with respect to that waste are inapplicable here.

In addition, Santa Clara focused on the liability of an owner of property for contaminated soil removed from the property. This decision is inapposite to Petitioner's case, where Petitioner is not the owner of the Navy ships but merely the contractor removing the hazardous waste.

Finally, Petitioner questions the precedential value of the unsigned SBE memorandum opinion which the Department attaches to its Brief.

IV

CONCLUSION

For the reasons stated above, and in Petitioner's original Petition for Redetermination, it is hereby requested that the SBE abate the generator fee and interest as set forth in the Notice of Determination and determine that the amount due and owing from Southwest Marine, Inc., for calendar year 1988 is only the fee on the waste removed from the single Navy oiler serviced in 1988. Evidence on the amount of this fee will be introduced at the hearing on April 16. It is further requested that Petitioner be refunded $9,968.00 plus interest.

DATED: April 8, 1992

Respectfully submitted,

GRAY, CARY, AMES & FRYE

By: W. Alan Lautanen

W. ALAN LAUTANEN
Attorneys for Southwest Marine, Inc.

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362-5101

IN REPLY REFER TO

7 Nov 90

Mr. Don R. Clay
Assistant Administrator for Solid Waste
and Emergency Response
Environmental Protection Agency
401 M Street, Southwest
Washington, DC 20460

Dear Mr. Clay:

The purpose of this correspondence is to enlist your assistance in resolving an issue regarding management and disposal of hazardous waste generated during Navy ship repairs performed by private shipyards.

The FY90 DOD Authorization Act amended 10 U.S.C. 7311 regarding hazardous waste management for contracts, other than new construction, for work on board naval vessels. The amendment, included at enclosure (1), requires the contractor to provide a hazardous waste generator identification number on manifests for contractor generated hazardous waste; the Navy to provide a hazardous waste generator identification number for Navy generated waste; and for the contractor and the Navy to provide a number for co-generated waste. The amendment further refined an existing requirement to identify the types and quantities of hazardous waste expected to be generated in the contractor's facility. Prior to the amendment, it was Navy policy that the owner of the facility where ship repair work was being performed would perform the hazardous waste generator duties including manifesting the waste using the shipyard owner's identification number. This policy was consistent with our understanding of applicable Federal and state laws.

The Naval Sea Systems Command (NAVSEA) and in particular, the Supervisors of Shipbuilding, Conversion and Repair (SUPSHIPs) who are responsible for managing private sector repairs of Navy ships throughout the country, have implemented the new provisions of 10 U.S.C. 7311 in standard work specifications and contract clauses for ship repair work and have applied for hazardous waste identification numbers with state and/or regional EPA offices.

Responses received from state agencies and EPA regional offices thus far have been inconsistent. We have included a copy of a State of South Carolina letter to EPA Region IV, a

State of Washington letter to the Navy, and two letters to Region IX from the Navy at enclosures (2) through (5) for your information. The unique provisions in 10 U.S.C. 7311 are requiring many states to review their own regulatory provisions. Further complicating the issue is the lack of definition of terms used only in 10 U.S.C. 7311. While several states have agreed to issue permanent generator numbers to SUPSHIPs, others interpret EPA regulations regarding "division of responsibility for generator duties" very rigidly - limiting the issuance of generator numbers to owners of the facility. This interpretation has prevented small ship repair contractors who perform work on Navy ships docked at a Navy facility from complying with the requirements of 10 U.S.C. 7311 to provide generator numbers to manifest hazardous waste they generate. It has also hampered Navy efforts to comply with the requirements of 10 U.S.C. 7311.

We are advised that several states have requested direction from the regional offices who in turn have requested rulings from EPA headquarters. A NAVSEA representative met with EPA headquarters personnel on 30 May 1990 and discussed in general the difficulties that the SUPSHIPs were having in obtaining generator numbers and that the states were having in fitting 10 U.S.C. 7311 requirements into their RCRA manifesting systems. While the meeting was productive in identifying the issues, no concrete solutions were identified.

The SUPSHIPs have managed to make arrangements for disposal of hazardous waste generated during performance of ship repair contracts or have directed the ships to off-load any Navy waste at Navy owned facilities prior to ship arrival at the repair facility. The efforts do not present a permanent or satisfactory solution, however, and with the recent involvement of EPA regional offices, it is time to resolve the issue. We need guidance to be issued that addresses the unique problems raised by 10 U.S.C. 7311 and allows us to comply in a consistent manner with its requirements and Resource Conservation and Recovery Act requirements for the responsible management of hazardous waste including a system for tracking its generation, management and disposal.

Since neither 10 U.S.C. 7311 nor RCRA define the terms "Navy generated," "contractor generated," and "co-generated," the Navy has developed its own contractual definitions. We believe these definitions are consistent with RCRA and have included a copy of our contract clause for your assistance in reviewing this issue. We would ask that any guidance provided by your office to the regions and states would facilitate our

use of the contract provisions to implement 10 U.S.C. 7311 and authorize the navy and the contractors, as appropriate, to obtain generator numbers for disposal of waste by a party other than the site owner. Senior members of my staff are available to meet with EPA personnel to examine the alternatives and assist in developing a solution. I have asked my Director of Environmental Protection, Dr. Kurt Riegel to take the lead on this very important issue. Dr. Riegel may be reached on (703) 602-3594.

P. M. HEKMAN, JR.
Vice Admiral, U.S. Navy

Encl:
(1) Excerpt from 10 U.S.C. 7311 as amended by FY90 DOD Authorization Act
(2) South Carolina Department of Health and Environmental Control letter of 4/17/90
(3) State of Washington Department of Ecology letter of 5/14/90
(4) Department of the Navy letter of 4/12/90
(5) Department of the Navy letter of 4/16/90

Copy to:
ASN (I&E)
NAVY OFFICE OF GENERAL COUNSEL
CNO (OP-04)

ENCLOSURE

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260 and 261

[SW FRL 1642-4]

Hazardous Waste Management System; General and Identification and Listing of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Interim final amendment to rule and request for comments.

SUMMARY: This regulation amends 40 CFR 261.4 to provide that a hazardous waste that is generated in a product or raw material storage tank, transport vehicle or vessel or in a manufacturing process unit is not subject to regulation under 40 CFR Parts 262 through 265 or Parts 122 through 124 or the requirements of Section 3010 of the Resource Conservation and Recovery Act (RCRA) until it is removed from the unit in which it was generated, unless the unit in which it is generated is a surface impoundment or unless the hazardous waste remains in the unit for more than 90 days after the unit ceases to be operated for the purpose of storing or transporting product or raw materials or manufacturing. This regulation also amends 40 CFR 260.10 to modify the definition of "generator" so that it clearly covers persons who remove hazardous wastes from product or raw material storage tanks, transport vehicles or vessels, or manufacturing process units in which the hazardous waste is generated. Finally, this regulation amends 40 CFR 260.10 to add definitions for "transport vehicle" and "vessel." The purpose of this requirement is to allow persons handling hazardous wastes sufficient lead time to prepare to comply with major new regulatory requirements. The effect of these amendments is to reduce the overall costs, economic impact and reporting and recordkeeping impacts of EPA's hazardous waste management regulations.

DATES: Effective Date: For the amendment to 40 CFR 261.4 and the definitions of "transport vehicle" and "vessel," in 40 CFR 260.10, November 19, 1980.

For the amendment to the definition of "generator," in 40 CFR 260.10, April 30, 1981.

Comment Date: This amendment is promulgated as an interim final rule. The Agency will accept comments on it until December 29, 1980.

ADDRESSES: Comments on the amendment should be sent to Docket Clerk [Docket No. 3001], Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: For general information, contact Alfred W. Lindsey, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, (202) 755-9185. For information on implementation, contact:

Region I, Dennis Huebner, Chief, Radiation, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203, (617) 223-5777

Region II, Dr. Ernest Regna, Chief, Solid Waste Branch, 26 Federal Plaza, New York, New York 10007, (212) 264-0504/5

Region III, Robert L. Allen, Chief, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106, (215) 597-0960

Region IV, James Scarbrough, Chief, Residuals Management Branch, 345 Courtland Street, N.E., Atlanta, Georgia 30365, (404) 881-3016

Region V, Karl J. Klepitsch, Jr., Chief, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6148

Region VI, R. Stan Jorgensen, Acting Chief, Solid Waste Branch, 1201 Elm Street, First International Building, Dallas, Texas 75270, (214) 787-2645

Region VII, Robert L. Morby, Chief, Hazardous Materials Branch, 324 E. 11th Street, Kansas City, Missouri 64106, (816) 374-3307

Region VIII, Lawrence P. Gazda, Chief, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203, (303) 837-2221

Region IX, Arnold R. Den, Chief, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105, (415) 556-4606

Region X, Kenneth D. Feigner, Chief, Waste Management Branch, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 442-1280.

SUPPLEMENTARY INFORMATION:

I. Amendment to 40 CFR 261.4

On February 26 and May 19, 1980, EPA promulgated hazardous waste regulations in 40 CFR Parts 260 through 265 (45 FR 12721 et seq. and 45 FR 33066 et seq.) and on May 19, 1980, promulgated consolidated permit regulations in 40 CFR Parts 122 through 124 (45 FR 33289 et seq.). Section 261.2 of these regulations provides that a solid waste is any garbage, refuse or sludge; or any other waste material which is (1) discarded or is being accumulated, stored or physically, chemically or biologically treated prior to being discarded; or (2) has served its original intended use and sometimes is discarded; or (3) is a manufacturing or mining by-product and sometimes is discarded. Section 261.3 provides that a solid waste becomes a hazardous waste when (1) it first meets any of the listing descriptions set forth in Part 261, Subpart D; or (2) it first becomes a mixture containing a hazardous waste listed in Part 261, Subpart D; or (3) it first exhibits one or more of the characteristics of hazardous waste identified in Part 261, Subpart C. Section 261.1 provides that hazardous wastes identified in Part 261 are subject to regulation under Parts 262 through 265 and Parts 122 through 124. The effect of these provisions, particularly § 261.3(b), is to make hazardous wastes subject to regulation at the point where they are generated. The point of generation, however, may be a product or raw material storage tank, transport vehicle or vessel, or a manufacturing process unit. A literal application of the Part 261 regulations would mean that such units are hazardous waste storage facilities, and that their owners and operators must comply with the notification requirements of Section 3010 of RCRA, submit applications for and obtain permits under Part 122 and comply with the Interim Status Standards of Part 265 until a permit is issued or denied. An exception to these requirements is provided in § 262.34 which states that hazardous waste may be accumulated on the site of its generation without a permit for 90 days or less before it is removed and transported off-site for treatment, storage or disposal. For such accumulation, the owner and operator of the unit must notify under Section 3010 and comply with § 262.34, including requirements for containerization, labelling, marking, inspection and personnel training.

Many members of the regulated community have questioned the Agency's intent and wisdom in regulating those units in which hazardous wastes are first generated. These people claim that such units only incidentally hold or treat hazardous wastes and thus should not be subject to the regulations. They contend that such hazardous wastes do not pose a hazard to human health or the environment while they remain in these units.

Commenters on this issue provided several examples of units in which hazardous wastes are generated which currently appear to be, perhaps unnecessarily, subject to the regulations.

provides that a hazardous waste which is generated in a manufacturing process unit or an associated non-waste treatment unit, or in a product or raw material storage tank, transport vehicle or vessel is not subject to regulation under Parts 262 through 265 or Parts 122 through 124 or the notification requirements of Section 3010 of RCRA until it is removed from the unit in which it is generated, unless the unit is a surface impoundment or unless the hazardous waste remains in the unit for more than 90 days after the unit ceases to be operated for the purpose of manufacturing, or storing or transporting product or raw materials.

II. Definition of Transport Vehicle and Vessel

As indicated in the above discussion, this amendment deals with hazardous wastes that are generated in product or raw material transport vehicles and vessels, as well as those generated in manufacturing units and product or raw material storage tanks. Because the terms "transport vehicle" and "vessel" are not currently defined in § 260.10, definitions of these terms are included in this amendment. These definitions are the same as those in the Department of Transportation regulations governing the transportation of hazardous materials (see 49 CFR 171.8).

III. Generator Responsibilities and Amendment to 40 CFR 260.10

Many members of the regulated community also have asked the question: Who is the generator of hazardous wastes that are generated in manufacturing process units or in product or raw material storage tanks, transport vehicles or vessels? These persons point out that, with respect to stationary product and raw material storage tanks, it is quite common for one person to own and operate the storage tank, a second person to own the product or raw material being stored, and a third person (usually under contract to either the first or second person) to remove and dispose of sludges, sediments and residues that may have been formed in the tank. It also is common for the owner and operator of the tank to also own the stored product or raw material, but to hire another person to remove and dispose of sediments and residues formed in the tanks. There are situations, of course, where the three parties are one person, or where more than three parties are involved.

The same scenarios occur with respect to tank trucks, rail cars, and ships and barges. However, these scenarios are commonly complicated by two additional practices. Oftentimes these transport vehicles or vessels are taken to a central facility for removal of sediment and residues and attendant tank washing or cleaning. Frequently, this central facility is owned or operated by a person other than the owner or operator of the vehicle or vessel and, even more frequently, other than the owner of the product or raw material that produced the sediment or residue. Secondly, the residue or sediment cleaned and removed from a vehicle or vessel may have been produced by two or more products, thus bringing into the picture additional parties—the owners of two or more products. This situation can also occur, but is less common, with stationary storage tanks.

With respect to manufacturing units, the situation typically is not complicated. Usually, the same person owns and operates the unit, owns the manufacturing materials that may generate a hazardous waste and removes any hazardous wastes generated in the unit. However, there are situations where two or more parties are involved. One such situation is where a second party is periodically retained to clean a unit. Another situation is where the hazardous waste is produced by the processing of materials that are owned by two or more persons. This occurs in the reclaiming of spent solvents and spent catalysts where the reclaimer custom-processes batches of spent material without taking ownership of the material.

The definition of "generator" in § 260.10 is "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 * * *." This definition suggests that the operator of a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel is a generator of a hazardous waste because it is his "act" of storage or transportation or his "process" of manufacturing that produces the hazardous waste. In the case of storage or transportation, the act of holding the product or raw material enables settling of heavy fractions of material to create hazardous waste sludges or sediments and enables hazardous waste residues to adhere to the tank. In the case of manufacturing processes, the process of manufacturing produces the hazardous wastes.

The owner of the product or raw material being stored or transported and the owner of the materials being manufactured also fit the definition of "generator" of the hazardous waste because their "acts" cause the product or material to be stored, transported or manufactured which leads to the generation of the hazardous wastes. Additionally, it is constituents in their product or material that "produce" a hazardous waste.

The definition of generator, particularly when read in conjunction with the amendment discussed above, also fits the person removing the hazardous waste from a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel. Although often it is not his "act or process" that produces the hazardous waste, it is his act that causes the hazardous waste to become subject to regulation (except where it is generated in a surface impoundment or remains in a non-operating unit for more than 90 days after cessation of operation).

The definition of generator, depending on the particular factual situation, can include all of the parties discussed above. Both the operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle or vessel, and the owner of the product or raw material act jointly to produce the hazardous waste generated therein, and the person who removes the hazardous waste from a tank, vehicle, vessel or manufacturing process unit subjects it to regulation. All three parties are involved and EPA believes that all three (and any others who fit the definition of "generator") have the responsibilities of a generator.

Because all three parties contribute to the generation of a hazardous waste and because none of the parties stands out in all cases as the predominant contributor, the Agency has concluded that the three parties should be jointly and severally liable as generators. The Agency will, of course, be satisfied if one of the three parties assumes and performs the duties of the generator on behalf of all of the parties. In fact, the Agency prefers and encourages such action and recommends that, where two or more parties are involved, they should mutually agree to have one party perform the generator duties. Where this is done, the Agency will look to that designated party to perform the generator responsibilities. Nevertheless, EPA reserves the right to enforce against any and all persons who fit the definition of "generator" in a particular case if the requirements of Part 262 are not adequately met, providing such enforcement is equitable and in the public interest.

Given this conclusion, the Agency believes it has an obligation to give guidance to the regulated community on who it prefers to assume the generator

operators of a large number of product and raw material storage tanks, transport vehicles and vessels, and manufacturing process units in which hazardous wastes are generated would have to prepare to operate these facilities as hazardous waste storage facilities on and after November 19, 1980. This would involve preparation and submission of a Part A permit application, preparation of a contingency plan and implementation of a number of administrative and operational practices required by Part 265 for hazardous waste storage facilities. The Agency believes it makes little sense to allow these requirements promulgated on May 19 to become effective on November 19, 1980, and then have them substantially modified on a subsequent date, i.e., the six-month effective date for these amendments.

The amendment to § 261.4 in effect suspends regulation of certain facilities by clarifying when certain hazardous wastes are first subject to the hazardous waste regulations. This lessening of regulatory requirements surely is not the type of revision to regulations that Congress had in mind when it provided a six-month delay between the promulgation and the effective date of revisions to regulations. Consequently, the Agency is setting an effective date of November 19, 1980, for the amendment to § 261.4 promulgated in this rulemaking action.

The definitions of "transport vehicle" and "vessel" are necessary for an understanding of the amendment to § 261.4 and consequently they too have an effective date of November 19, 1980.

EPA is making the amendment to the definition of "generator" effective six months after promulgation, as provided in Section 3010(b) of RCRA. Although many persons who remove hazardous wastes from manufacturing units or from product or raw material storage tanks, vehicles or vessels, recognized that in certain situations they fell within the May 19, 1980, definition of generators, the amendment to the definition will probably make some additional persons generators. These people undoubtedly deserve the six month lead time that Congress provided in Section 3010(b). All persons who fit the May 19 definition of "generator" must comply with all applicable generator requirements on November 19, 1980. Only those persons who are made generators by today's amendment to the definition have an additional six months before they must comply with Part 262 requirements.

VII. Regulatory Impacts

The effect of these amendments is to reduce the overall costs, economic impact and reporting and recordkeeping impacts of EPA's hazardous waste management regulations. This is achieved by removing from regulation as storage facilities product and raw materials storage tanks, transport vehicles and vessels, and manufacturing process units that generate hazardous waste. The Agency is unable to estimate these cost and impact reductions because it does not have an estimate of the number of such tanks and units that otherwise would be regulated. For the reasons already discussed, notwithstanding these cost and impact reductions, the Agency believes that human health and environmental protection will not be reduced by this action.

VIII. Request for Comments

The Agency invites comments on all aspects of these amendments and on all of the issues discussed in this preamble, including the interpretation of "generator," the allowance of 90-day accumulation to all generators, and the notification and EPA Identification Number requirements. EPA is providing a 60-day comment period.

The Agency also invites comments on whether the amendment should also apply to hazardous wastes generated in product or raw material containers other than transportation vehicles and vessels (see § 260.10 for definition of the term "containers"). The Agency has not applied this amendment to such hazardous wastes because it is not aware that significant amounts of hazardous wastes are generated in product or raw material containers (exclusive of transportation vehicles or vessels).

The Agency recognizes that a wide variety of situations exist in the real world, and it is anxious to make its regulations and regulatory interpretations reasonable, understandable, and capable of implementation. The Agency can only do this by learning of situations where the regulations do not work well.

Dated: October 24, 1980.

Douglas M. Costle,
Administrator.

Title 40 of the Code of Federal Regulations is amended as follows:

1. Add the following paragraph (c) to § 261.4:

§ 261.4 Exclusions.

* * * * *

(c) Hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, or in a manufacturing process unit or an associated non-waste-treatment manufacturing unit, is not subject to regulation under Parts 262 through 265 and Parts 122 through 124 of this chapter or to the notification requirements of Section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation or product or raw materials.

§ 260.10 [Amended]

2. Amend the definition of "Generator" in § 260.10 to read as follows:

* * * * *

Generator means any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation.

* * * * *

3. Add the following definitions to § 260.10:

* * * * *

"Transport vehicle" means a motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. "Vessel" includes every description of watercraft, used or capable of being used as a means of transportation on the water.

[FR Doc. 80-33068 Filed 10-29-80; 8:45 am]
BILLING CODE 6560-26-M

COPY

STATE BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

IN THE MATTER OF THE PETITION OF
SOUTHWEST MARINE, INC.

HG HQ 36-019852-001
HG HQ 36-019852-010
GENERATOR FEE PERIOD
1/1/88 - 12/31/88

TRANSCRIPT OF PROCEEDINGS

SAN DIEGO, CALIFORNIA

APRIL 16, 1992

REPORTED BY JANE A. BRAMBLETT, CSR NO. 7574

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APPEARANCES:

BEFORE HERBERT L. COHEN
SENIOR STAFF COUNSEL, SPECIALIST
BUSINESS TAXES APPEALS REVIEW SECTION

FOR SOUTHWEST MARINE, INC.:

GRAY, CARY, AMES & FRYE
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LISA C. MERRILL, ESQ.
401 B STREET
SUITE 1700
SAN DIEGO, CALIFORNIA, 92101

STATE OF CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, DEPARTMENT OF TOXIC SUBSTANCES CONTROL:

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400 P STREET
P.O. BOX 806
SACRAMENTO, CALIFORNIA 95812

STATE OF CALIFORNIA BOARD OF EQUALIZATION

SPECIAL TAXES DIVISION
BY: ALAN D. MALBOUVIER, ESQ.
1900 CAPITOL AVENUE
P.O. BOX 942879
SACRAMENTO, CALIFORNIA 94279

ALSO PRESENT: DANA M. AUSTIN
ROBERT WHITE

MR. COHEN: LET ME START OFF BY RUNNING THROUGH OUR PROCEDURES SO YOU'LL UNDERSTAND HOW THE PROCESS WORKS. THIS IS INFORMAL. THE PURPOSE IS TO GIVE YOU A CHANCE TO PRESENT YOUR ARGUMENTS AND EVIDENCE, AS THE CASE MAY BE, AND GIVES ME A CHANCE TO TRY TO GET ALL THE INFORMATION THAT I THINK I'LL NEED IN ORDER TO COME TO A CONCLUSION ON IT. I DON'T MAKE A DECISION HERE TODAY. WHAT I DO IS WHEN I GET BACK TO SACRAMENTO, I WRITE A REPORT, WHICH IS IN ESSENCE A RECOMMENDATION TO THE BOARD AS TO WHAT ACTION SHOULD BE TAKEN. IF THEY -- IF MY RECOMMENDATION IS NOT OPPOSED, THE BOARD WILL MORE OR LESS ROUTINELY ADOPT IT AND ANY CHANGES THAT ARE RECOMMENDED WILL BE IMPLEMENTED.

IF YOU'RE DISSATISFIED WITH MY RECOMMENDATION, YOU'RE ENTITLED TO HAVE A HEARING BEFORE THE BOARD ITSELF. THAT'S SOMEWHAT MORE FORMAL, BUT IT'S NOT A COURTROOM TYPE OF PROCEEDING. THE DEPARTMENT OF TOXIC SUBSTANCES THROUGH THE BOARD OF EQUALIZATION, SPECIAL TAXES DIVISION CAN ALSO REQUEST A HEARING BEFORE THE BOARD IF THEY ARE DISSATISFIED WITH MY RECOMMENDATION.

THE BOARD MEETS EVERY MONTH IN SACRAMENTO. IT MEETS USUALLY ONCE A YEAR IN SAN DIEGO. AS I RECALL, IT'S USUALLY IN THE FALL. IT WOULD BE YOUR OPTION SINCE SACRAMENTO IS FAR FROM SAN DIEGO, THAT YOU COULD ASK FOR THE HEARING TO BE HELD HERE IN SAN DIEGO, WHICH COULD MEAN YOU MIGHT HAVE TO WAIT, DEPENDING ON HOW THE WHEELS TURN, WHETHER YOU MIGHT HAVE TO WAIT TO A YEAR FROM THIS FALL. THE BOARD, AS I SAY, DOES MEET EVERY

MONTH IN SACRAMENTO.

IF AFTER YOU GET MY REPORT, IF YOU'RE DISSATISFIED WITH IT AND ARE IN A HURRY, YOU CAN ASK FOR A HEARING IN SACRAMENTO.

ANY QUESTIONS ABOUT THE PROCESS?

MR. LAUTANEN: IT WOULD BE POSSIBLE CONCEIVABLY TO HAVE A HEARING IN TORRANCE OR SOMETHING LIKE THAT, THE OTHER PLACES THEY MEET.

MR. COHEN: THAT'S TRUE, THE BOARD DOES MEET IN THE L.A. AREA USUALLY FOUR OR FIVE TIMES A YEAR, USUALLY IN TORRANCE. FROM TIME TO TIME THEY DO MEET ELSEWHERE. FROM TIME TO TIME. SOME YEARS THEY MAY PICK SOME OTHER PLACES TO MEET.

OKAY. ANY QUESTIONS? ARE YOU CLEAR ON HOW THE DEPARTMENT OF TOXIC SUBSTANCES ARRIVES AT THEIR CONCLUSIONS, OR WOULD YOU LIKE FOR MR. MAHONEY TO RUN THROUGH AND HIGHLIGHT HIS BRIEF FIRST?

MR. LAUTANEN: I THINK WE'RE CLEAR. WE WERE A LITTLE SURPRISED WHEN WE FILED OUR PETITION. WE RELIED IN PART ON SEVERAL PRIOR LETTERS FROM THE DEPARTMENT INDICATING THAT THEY FELT THAT THE NAVY WAS THE GENERATOR. AND THESE ARE IN THE '85, '86 TIME PERIOD. AND AFTER I FILED THE PETITION, I CALLED UP THE DEPARTMENT TO SEE IF I COULD ENLIST YOU IN AGREEING -- I MEAN FILING A BRIEF AGREEING WITH US. AND I SINCERELY THOUGHT THAT MIGHT BE THE CASE. I THINK I UNDERSTAND YOUR ARGUMENTS, BUT I WAS A LITTLE SURPRISED BY THE CHANGE IN POSITION, YOU

KNOW, FROM WHAT WE PREVIOUSLY RECEIVED SEVERAL YEARS AGO AS FAR AS THE NAVY GENERATOR STATUS. SO HAVING SAID THAT, I THINK I UNDERSTAND THE ARGUMENTS THAT YOU'RE MAKING. BUT I WAS A LITTLE SURPRISED BY THE CHANGE IN POSITION OF THE DEPARTMENT.

MR. COHEN: DO YOU WANT TO RESPOND TO THAT?

MR. MAHONEY: WELL, ONLY THAT WHAT MAY HAVE BEEN SAID IN THE EARLY '80'S, YOU KNOW, THIS IS A COMPLETELY DIFFERENT CIRCUMSTANCES AT THE TIME. AT THE TIME THAT WHAT IS NOW THE DEPARTMENT OF TOXIC SUBSTANCES CONTROL WAS ONLY A VERY SMALL, INSIGNIFICANT DIVISION OF THE DEPARTMENT OF HEALTH SERVICES. BUT I WOULD SAY WE HAVE NOT CHANGED OUR POSITION IN THAT AS FAR AS THE NAVY GENERATOR. YOU KNOW, I DON'T THINK WE WOULD CHALLENGE THE NAVY STATUS AS A GENERATOR. WHAT OUR POSITION IS IS THAT UNDER THE REGULATIONS -- AND I WOULD GET MORE TO THIS IN A MOMENT -- UNDER THE REGULATIONS, THAT THERE COULD BE MORE THAN ONE GENERATOR. YOU KNOW, I'M NOT GOING TO MAKE A BOLD STATEMENT HERE THAT I DO BELIEVE THE NAVY IS A GENERATOR, FOR THE SIMPLE REASON THAT THAT'S NOT AN ISSUE. BUT YOU KNOW, IT WOULD BE OUR POSITION THAT THE NAVY BEING A GENERATOR DOES NOT PRECLUDE SOUTHWEST MARINE FROM ALSO BEING A GENERATOR.

MR. COHEN: BEFORE WE GET ANY DEEPER, LET ME CLARIFY ONE POINT FOR MYSELF. THERE IS BOTH A PETITION AND A CLAIM FOR REFUND. MY UNDERSTANDING IN LOOKING AT THE FILE IS THAT THE CLAIM FOR REFUND HAS TO DO WITH AMOUNTS THAT WERE PAID

BUT THE ISSUE IS IDENTICAL.

MR. LAUTANEN: IDENTICAL UNDERLYING ISSUE.

MR. COHEN: THE CLAIM IS THE AMOUNTS PAID VOLUNTARILY. THE PETITION IS THE AMOUNT THE DEPARTMENT OF TOXIC SUBSTANCES BILLED THROUGH THE BOARD OF EQUALIZATION --

MR. LAUTANEN: SAME YEAR.

MR. COHEN: SAME YEAR, SAME ACTIVITY.

AND YOU WANT TO PROCEED IN EXPLAINING WHY THE FEES IS A TAX IN --

MR. LAUTANEN: SURE.

BEFORE I START, I KNOW THAT BOTH MR. WHITE AND MR. AUSTIN ARE ON THE RECORD. I DON'T KNOW IF YOU WANT -- THEY'RE HERE AND IN PARTICULAR MR. AUSTIN IS HERE BECAUSE TO THE EXTENT THAT THERE ARE FACTUAL QUESTIONS -- AND I THINK THERE MAY BE ONE, IF THAT. BUT HE'S HERE TO TESTIFY AS TO FACTUAL THINGS. AND IN ADDITION, HE HAS A LONG HISTORY OF WORKING WITH SOME OF THE REGULATIONS THAT WE'RE TALKING ABOUT. AND REALLY HAS AN EXTENSIVE KNOWLEDGE OF THOSE. MY QUESTION IS -- HE HAS BEEN INTRODUCED AND IDENTIFIED ON THE RECORD. MY QUESTION IS WHETHER OR NOT YOU WOULD WANT TO HAVE HIM SWORN.

MR. COHEN: NO. WE DON'T SWEAR WITNESSES.

MR. LAUTANEN: GREAT. GREAT.

SOUTHWEST MARINE IS A GENERAL SHIP REPAIR FACILITY LOCATED HERE IN SAN DIEGO BAY JUST OUT ON THE OTHER SIDE OF THE CORONADO BRIDGE. THEY DON'T BUILD SHIPS THERE. WHAT THEY DO IS

REPAIR AND OVERHAUL SHIPS, BOTH FOR COMMERCIAL OWNERS AS WELL AS THE NAVY. FOR PURPOSES OF THIS HEARING I THINK ALL WE'RE TALKING ABOUT IS THE WORK THAT THEY DO ON NAVY SHIPS AND THE WORK THAT THEY DO ON NAVY SHIPS IN THEIR YARD. I THINK THAT'S WHAT WE'RE --

MR. COHEN: YOU MEAN IN SOUTHWEST MARINE'S --

MR. LAUTANEN: THAT'S CORRECT. THAT'S CORRECT.

I THINK THOSE ARE THE PARAMETERS OF THE ISSUE HERE. I ALSO BELIEVE BASED ON A READING OF THE BOARD'S -- THE DEPARTMENT'S PAPERS, THAT WE CAN LOOK AT THE TYPES OF NAVY SHIPS THAT THEY WORK ON AND BREAK THEM DOWN INTO TWO CATEGORIES. ONE CATEGORY WOULD BE WAR SHIPS. THE OTHER CATEGORY WOULD BE AN OILER. AND IN THE LATTER CATEGORY, I USE THE TERM "OILER" BECAUSE I HAVE LEARNED A LOT FROM THESE GUYS IN WORKING ON THIS CASE, BUT THAT WOULD BE A VESSEL WHOSE PRIMARY PURPOSE IS TO CARRY FUEL FOR OTHER SHIPS IN THE FLEET. AND I THINK FOR PURPOSES OF THIS HEARING IT'S HELPFUL TO KEEP THAT DISTINCTION.

MR. COHEN: THIS IS THE DISTINCTION YOU MADE IN THE BRIEF BETWEEN --

MR. LAUTANEN: THIS IS THE DISTINCTION WE'RE ARGUING IN THE BRIEF. AND I BELIEVE THIS IS THE DISTINCTION THAT'S MADE IN THE REGULATIONS ON WHICH THE DEPARTMENT IS BASING THEIR POSITION. WHAT WE DO ON THESE SHIPS -- YOU KNOW, AS YOU KNOW, THESE ARE NAVY SHIPS AND THEY'RE DEPLOYED ALL OVER THE WORLD. THERE ARE A NUMBER OF THEM HOME PORTED HERE IN SAN

DIEGO. THE WAR SHIPS IN PARTICULAR, IF YOU'VE EVER BEEN ON ONE, THEY'RE CRAMMED FULL OF MECHANICAL SYSTEMS. YOU HAVE THE ENGINES THAT DRIVE THE SHIPS, YOU HAVE HYDRAULIC SYSTEMS THAT RAISE AND LOWER ELEVATORS, YOU HAVE WEAPONS SYSTEMS, DESALINIZATION SYSTEMS. IF YOU WALK DOWN THROUGH THE BILGE OF THAT SHIP, IT'S LITERALLY CRAMMED FULL OF THESE MECHANICAL SYSTEMS.

AND WHAT HAPPENS WITH THESE SHIPS IS THEY'RE OUT ON THE HIGH SEAS, VIRTUALLY EVERY ONE OF THOSE SYSTEMS LEAKS. THEY'RE ALL LUBRICATED BY OIL. THEY HAVE HYDRAULIC FLUID IN THEM AND WHILE THE SHIP IS BEING OPERATED OUT ON THE HIGH SEAS, THEY LEAK. AND ALL THAT MATERIAL THAT LEAKS, ALL OF THE THOSE SYSTEMS, ACCUMULATES IN THE BILGE OF THE SHIP. THAT'S REALLY NOT A PROBLEM WHEN YOU'RE, I DON'T KNOW, IN THE PHILIPPINES OR SOMEWHERE OUTSIDE THE 12-MILE LIMIT BECAUSE WHAT HAPPENS WITH THOSE BILGES WHEN THE SHIPS ARE OUT AT SEA, THEY PUMP IT OVER BOARD.

NOW, OBVIOUSLY THEY'RE NOT ALLOWED TO DO THAT UNDER THE FEDERAL ENVIRONMENTAL LAWS AND PROBABLY THE CALIFORNIA ENVIRONMENTAL LAWS. THEY'RE NOT ALLOWED TO DO THAT WITHIN THE CONFINES OF THE 12-MILE LIMIT OR WITHIN THE SAN DIEGO BAY. SO WHAT HAPPENS WHEN THEY COME INTO OUR FACILITY FOR AN OVERHAUL, ONE OF THE THINGS THAT WE DO IS WE CLEAN OUT ALL THAT ACCUMULATED WASTE THAT'S IN THE BILGE OF THE SHIP.

NOW, THAT IS CERTAINLY NOT EVERYTHING THAT WE DO.

MANY TIMES PART OF THE CONTRACT WILL BE PAINTING. AND WHEN WE PAINT A SHIP, WHAT THAT INVOLVES IS GOING IN AND SANDBLASTING THE HULL OR THE SUPERSTRUCTURE OR WHATEVER IT IS THAT'S SUPPOSED TO BE PAINTED. THAT SANDBLASTING PROCESS ALSO GENERATES A LOT OF WASTE, HAZARDOUS WASTE, AND THAT MATERIAL IS MATERIAL THAT WE DO MANIFEST UNDER OUR OWN NUMBER. THAT MATERIAL IS MATERIAL THAT WE REPORT AND PAY THE HAZARDOUS WASTE GENERATOR FEE ON.

MR. COHEN: THAT'S THE PART YOU'RE ASKING BACK IS THE --

MR. LAUTANEN: PARDON?

MR. COHEN: THAT'S THE PART YOU'RE --

MR. LAUTANEN: NO, IT'S NOT. WE DON'T CONTEST LIABILITY FOR THAT KIND OF WASTE. WHEN A SHIP COMES IN AND WE MIGHT PAINT, WE CAN SEE WE'RE THE GENERATOR OF THAT WASTE AND WE DO PAY TAX ON THAT.

WHAT WE ARE CONTESTING, SOMETHING THAT COMES OUT OF THE BILGES. AND WHAT HAPPENS, IF YOU GO DOWN THERE WHILE ONE OF THESE SHIPS IS BEING WORKED ON, THERE'S A BIG HOSE THAT GOES DOWN INTO THE BILGE. AND WHAT'S IN THAT BILGE IS PUMPED OUT. IT GOES INTO A DOCKSIDE SETTLING TANK. THE OIL AND SOME OF THE OTHER CONTAMINANTS THAT ARE IN THERE SETTLE TO THE BOTTOM. AND I THINK THIS IS THAT SETTLEMENT I THINK IS WHAT JOAN REFERRED TO IN HER BRIEF AS THE CAKE, I BELIEVE WAS THE TERM. IT'S OUR POSITION THAT NONE OF THAT STUFF THAT'S PUMPED OUT OF THE BILGE ON WAR SHIPS NOW, THAT NONE OF THAT STUFF IS GENERATED BY US.

IT'S GENERATED BY THE WAR SHIP AS IT'S OUT OPERATING ON THE HIGH SEAS OR OPERATING IN SAN DIEGO BAY OR SITTING AT THE DOCK AT 32ND STREET OR NORTH ISLAND.

IT'S OUR POSITION THAT THAT MATERIAL THAT WE TAKE OUT IS -- THAT WE DON'T HAVE GENERATOR RESPONSIBILITIES FOR THAT MATERIAL. I WANT TO MAKE A DISTINCTION BETWEEN THAT TYPE OF VESSEL AND WHAT I'LL REFER TO AS AN OILER OR A TRANSPORT VESSEL. AND THINKING --

MR. COHEN: BY "TRANSPORT," ARE YOU INCLUDING THINGS LIKE TROOP TRANSPORT? I GUESS WE DON'T HAVE ANY OF THOSE AT THIS POINT.

MR. LAUTANEN: NO. NO. STRICTLY I THINK IN THE NAVY SITUATION --

MR. COHEN: CARGO SHIPS.

MR. LAUTANEN: OIL.

MR. COHEN: ONLY OIL.

MR. LAUTANEN: ONLY OIL. I CAN'T THINK OF THE NAME OF THE ONE OF THE NAVY, ON THE CIVILIAN SIDE SOMETHING LIKE THE EXXON VALDEZ, TO USE A NAME THAT WE'RE ALL FAMILIAR WITH.

WITH RESPECT TO THOSE KINDS OF VESSELS, WE WOULD ALSO CONCEDE UNDER THE REGULATION THAT YOU'VE CITED THAT WE'RE A COGENERATOR. BUT THAT'S THE OILERS. AND THIS IS WHERE MAYBE WE CAN STIPULATE ON THE FACTUAL QUESTIONS. BUT IN OUR RESPONSE TO THE DEPARTMENT'S PAPERS, I MADE THE REPRESENTATION THAT ONLY ONE OF THE VESSELS THAT WE SERVICED IN '88 WAS INDEED AN OILER.

SINCE THAT TIME MR. AUSTIN HAS GONE BACK THROUGH THE RECORDS ANI COMPILED A LIST, FAIRLY SHORT LIST OF THE VESSELS THAT WE DID SERVICE IN '88, THE NAVY VESSELS THAT WE SERVICED IN '88, AND II FACT NONE OF THOSE VESSELS ARE OILERS.

MR. COHEN: NOT EVEN THE ONE THAT --

MR. LAUTANEN: I SAY IN THE PETITION THAT THERE WA: ONLY ONE. AND HE LOOKED -- THERE WERE ACTUALLY ZERO FOR THE YEAR IN QUESTION. AND, YOU KNOW, IF THERE ARE FACTUAL QUESTION: AS TO THAT, THEY DON'T VERIFY THAT.

MR. COHEN: ALTHOUGH YOU'RE CONCEDING YOU'RE COGENERATOR ON OILERS, THERE WEREN'T ANY IN THIS PARTICULAR BILLING CYCLE.

MR. LAUTANEN: THAT'S RIGHT.

MR. MAHONEY: WE'RE NOT CONTESTING THAT.

MR. LAUTANEN: THANK YOU.

OUR POSITION IS WITH RESPECT TO THE WAR SHIPS, WE'RE NOT GENERATORS BECAUSE THE WASTE IS GENERATED BY THE NAVY AT SEA, IN THE BAY, IN THEIR FACILITY, WHEREVER THE SHIP HAPPEN TO BE, THE SHIP IS THE SITE GENERATING THE HAZARDOUS WASTE. WE THINK UNDER THE FACTS IT'S FAIRLY CLEAR THAT OUGHT TO BE THE CASE.

AS I UNDERSTAND THE DEPARTMENT'S POSITION, THE DEPARTMENT IS SAYING THERE'S THIS FEDERAL REGULATION THAT SAYS THAT IF YOU'RE REPAIRING A VESSEL, YOU'RE A COGENERATOR WITH TH OWNER OF THE VESSEL. AND ONCE YOU ESTABLISH COGENERATOR STATUS

UNDER THAT REGULATION, THEN THE LIABILITY FOR THE TAX OR THE FEE, WHATEVER YOU WANT TO CALL IT, IS BASED ON A CONTRACT BETWEEN THE PARTIES. WE DON'T BELIEVE THAT WE ARE A COGENERATOR UNDER THAT PARTICULAR REGULATION.

THAT REGULATION WAS PROMULGATED IN 1980. AND IT WAS PROMULGATED TO APPLY TO SELF-CONTAINED HAZARDOUS MATERIAL TRANSPORTS OR MANUFACTURING UNITS, SUCH AS A TANK FORM, A RAILROAD TANK CAR, A SEMI-TRAILER DESIGNED TO CARRY GASOLINE OR OIL OR MOST APPLICABLE TO OUR CASE, AN OIL TANKER. AND WHAT THE REGULATION SAYS IS WITH RESPECT TO THOSE TYPES OF VEHICLES, VESSELS, OR CONTAINERS, THE OWNER AND THE CONTRACTOR WHO CLEANS THEM OUT ARE COGENERATORS.

NOW, THE REASON THERE'S A DISTINCTION BETWEEN THOSE TYPES OF VESSELS AND THE WAR SHIPS THAT WE'RE SERVICING IS THAT THERE WAS A DETERMINATION MADE IN 1980 AND PROMULGATING THE REGULATION THAT THOSE TYPES OF SELF-CONTAINED VESSELS OUGHT NOT TO BE SUBJECT TO REGULATION PRIOR TO THE TIME THAT THEY WERE CLEANED OUT. AND THE THEORY WAS BECAUSE THEY ARE SELF-CONTAINED UNITS, THEY DON'T NEED TO BE REGULATED, THEREFORE YOU CAN'T BE GENERATING WASTE PRIOR TO THE TIME THAT THEY'RE CLEANED OUT.

AND IF YOU GO LOOK IN THE HOLD OF AN OIL TANKER LIKE THE EXXON VALDEZ, ALL THE MECHANICAL SYSTEMS THAT I DESCRIBED AS FILLING UP THIS NAVY WAR SHIP, THEY'RE NOT THERE. YOU LOOK IN THE HOLD OF THE EXXON VALDEZ AND YOU HAVE THESE GIANT CARGO HOLDS, AND IF WE WERE CLEANING OUT THOSE THINGS, WE

WOULD BE COGENERATORS AND THE REGULATION WOULD APPLY. BUT THAT'S NOT WHAT WE'RE DOING. THAT I THINK IS THE DEPARTMENT'S CONTENTION, AS I UNDERSTAND IT.

AND, YOU KNOW, WHEN YOU GET YOUR TURN, I'LL OBVIOUSLY WANT TO LISTEN TO WHAT YOU HAVE TO SAY.

THE OTHER THING THAT'S IN THE DEPARTMENT'S PAPERS THAT CAUSED ME A LITTLE CONCERN WAS THE SANTA CLARA RANCH CASE. I THINK IT'S ATTACHED TO THEIR PAPERS, EXHIBIT D, MAYBE.

MR. COHEN: I'M FAMILIAR WITH IT.

MR. LAUTANEN: YOU'RE FAMILIAR WITH THE CASE?

MR. COHEN: I'M FAMILIAR WITH THE REPORT, YEAH.

MR. LAUTANEN: I LOOKED AT THAT AT FIRST AND I WASN'T SURE HOW WE WERE DIFFERENT FROM THAT CASE. AND THEN AFTER THINKING ABOUT IT AND LOOKING AT IT A LITTLE BIT AND TALKING WITH MR. AUSTIN, I REALIZED THAT THERE WERE TWO BIG DIFFERENCES BETWEEN WHAT'S GOING ON IN OUR SITUATION AND WHAT WAS HAPPENING IN THAT CASE.

ONE DIFFERENCE, FACTUALLY, IS THAT IT WAS THE PROPERTY OWNER THAT WAS FOUND LIABLE IN THAT CASE. THERE WAS NO QUESTION IN THE CASE AS TO WHO WAS LIABLE. THE ONLY QUESTION WAS THE AMOUNT OF THE TAX. AND THE QUESTION WAS: WAS THE AMOUNT OF THE TAX BASED ON THE SOIL CONTAMINATION AS THE TANK WAS LEAKING OVER THE YEARS OR WAS IT BASED ON THE AMOUNT OF CONTAMINATED SOIL THAT WAS REMOVED BY THE PROPERTY OWNER.

IN OUR CASE, THE NAVY IS THE PROPERTY OWNER, AND

THAT'S WHO WE CONTEND IS RESPONSIBLE FOR THE SITE AND RESPONSIBLE FOR THE GENERATION OF THE WASTE. THAT'S ENTIRELY CONSISTENT WITH SANTA CLARA.

MR. COHEN: IN THIS CASE YOU'RE LOOKING AT THE PROPERTY AT BEING THE VESSEL RATHER --

MR. LAUTANEN: THAT'S CORRECT. THE WHOLE QUESTION OF GENERATOR LIABILITY. IT'S A SITE-SPECIFIC QUESTION. AND WE VIEW THE VESSEL AS THE EQUIVALENT OF THE LAND. NOTEWORTHY OR REMARKABLY ABSENT FROM THAT CASE, THERE'S NO CONTRACT. AND I DON'T KNOW IF THAT WAS SOMETHING THAT JUST DIDN'T COME OUT OR WAS NEVER REGARDED. I DID NOTICE THERE WERE 480 TONS OF CONTAMINATED SOIL REMOVED FROM THAT PROPERTY. I READ THAT AND KEPT WAITING TO GET TO THE PART THEY TALKED ABOUT THE LIABILITY OF THE CONTRACTOR THAT REMOVED THE SOIL. AND THEY NEVER GOT TO IT.

MR. COHEN: MY UNDERSTANDING OF THE CASE IS THAT THE ONLY THING IN ISSUE WAS WHETHER THE PROPERTY OWNER WAS LIABLE OR SOMEONE ELSE.

MR. MAHONEY: THE PREVIOUS OWNER.

MR. COHEN: YEAH.

MR. MAHONEY: APPARENTLY SOMETHING --

MR. COHEN: IT NEVER REACHED THAT QUESTION IS MY UNDERSTANDING.

MR. LAUTANEN: IT'S NOTHING THAT WAS DISCUSSED IN THE CASE.

MR. MAHONEY: THAT'S CORRECT.

MR. LAUTANEN: RIGHT. RIGHT.

THE OTHER THING THAT DISTINGUISHES THAT CASE FROM OUR SITUATION IS THAT THAT DIRT THAT WAS BEING REMOVED WAS NEVER WASTE UNDER THE DEFINITION OF "WASTE" UNTIL THE TIME IT WAS REMOVED BY THE PROPERTY OWNER. AND IF YOU WORK THROUGH THE DEFINITION OF WASTE IN THE CALIFORNIA REGULATIONS--AND WE'RE CERTAINLY PREPARED TO DO THAT--"WASTE" IS DEFINED FOR OUR PURPOSES AGAIN AS RELEVANT IN THIS SITUATION AS SOMETHING THAT IS STORED PRIOR TO RELINQUISHMENT AS WASTE.

AND BY DEFINITION, THE CONTAMINATED SOIL IN THAT SANTA CLARA CASE, IT WASN'T WASTE UNTIL IT WAS REMOVED. THAT'S NOT OUR CASE. IN OUR CASE WE'VE GOT A WHOLE BUNCH OF CONTAMINANTS TURNING AROUND IN THE BILGES OF THESE SHIPS, THAT ARE CLEARLY WASTE BEFORE WE'RE EVEN INVOLVED. THEY'RE WASTE IN THE HOLD OF THAT SHIP WHEN THEY COME INTO OUR FACILITY TO BE REMOVED.

SO I THINK THERE ARE SOME -- THAT CASE, IT'S A DIFFERENT ISSUE, NUMBER ONE. AND NUMBER TWO, THAT CASE DIDN'T DEAL WITH SOMETHING THAT WAS WASTE UNTIL REMOVED. AND IN OUR SITUATION, WE'RE REMOVING SOMETHING THAT IS CLEARLY WASTE ALREADY. NAVY ISN'T GOING TO DO ANYTHING WITH THAT STUFF THAT'S CHURNING AROUND DOWN THERE OTHER THAN GET RID OF IT. THAT'S OUR POSITION.

WE'VE ALSO MADE AN ARGUMENT IN THE PETITION--AND I

THINK THIS IS A VALID ARGUMENT--THAT WHAT'S REALLY GOING ON HERE IF WE ARE FOUND LIABLE IS THAT YOU'VE GOT AN INDIRECT TAX ON THE NAVY. AND I DON'T KNOW TO WHAT EXTENT THAT YOU'VE HAD OCCASION TO DEAL WITH SALES TAX CASES AND SOME OF THE EXEMPTIONS TO SALES TO GOVERNMENT AGENCIES. BUT I LOOK AT THE AEROSPACE CASE AND INDEED THE SBE REGULATION DEALING WITH SALES TAXES THAT TALKS ABOUT SALES --

MR. COHEN: THERE'S A WIGGLY LINE THROUGH THERE ON SALES TAX BETWEEN -- THE CASE ESCAPES ME AT THE MOMENT, DIAMOND NATIONAL.

MR. LAUTANEN: YEAH.

MR. COHEN: DIAMOND NATIONAL AND NEW MEXICO VERSUS U.S. CASE, WHICH IS THE OTHER DIRECTION. IT'S NOT ALWAYS EASY TO FOLLOW THAT LINE. THAT'S AN INTERESTING POINT BECAUSE THIS WAS SPECIFIC -- MY UNDERSTANDING OF THE WAY THE LAW DEVELOPED WAS THAT IT WAS SPECIFICALLY MADE A FEE, THAT IS, A USER'S FEE, IN ORDER TO BE ABLE TO COLLECT FEES FROM THE GOVERNMENT. OR IF IT WAS A TAX, IT COULD NOT -- LIKE FOR INSTANCE IN SACRAMENTO THERE'S MC CLELLAND AIR FORCE BASE AND MATHER AIR FORCE BASE. AND IF THERE WAS A TAX, THERE WOULD BE NO WAY TO APPLY IT TO THOSE BASES, WHEREAS A USER'S FEE IT COULD BE. I'M NOT SAYING I'M DISCOUNTING YOUR ARGUMENT. I WANTED TO POINT THIS OUT.

MR. LAUTANEN: I RECOGNIZE THAT DISTINCTION.

MR. COHEN: I BELIEVE THAT AT LEAST SOME PIECES OF THE GOVERNMENT, FEDERAL GOVERNMENT SAYING THE SIZE OF THE,

QUOTE, FEES ARE SO LARGE IT REALLY ISN'T A FEE, IT'S A TAX.

MR. LAUTANEN: IN RELATION TO THE SERVICES.

MR. COHEN: TO THAT ISSUE I DON'T THINK -- ARE YOU IN COURT ON THIS AT ALL?

MR. MAHONEY: NO. FOR A LONG TIME WE THOUGHT WE WERE GOING TO BE. WE'VE BEEN WRANGLING WITH THE MILITARY OVER THAT FOR A LONG TIME. THE MILITARY'S POSITION WAS OKAY, WE'LL PAY FEES, WOULDN'T PAY TAXES. UNFORTUNATELY THE LINE IS NOT CLEAR ON WHAT'S A FEE AND WHAT'S A TAX. SOMETIMES IT BLURS. FOR THE LONGEST TIME THEY SAID THAT THE FEES THAT ARE MORE CLEARLY FEES, SUCH AS THE ANNUAL FACILITY FEE AND CERTAINLY OUR PERMIT ACTIVITY FEES, THEY'VE ALWAYS BEEN WILLING TO PAY THAT.

MORE RECENTLY THEY'VE BEEN -- THE BRANCHES HAVE EXPRESSED WILLINGNESS TO PAY THE GENERATOR FEE. I DON'T KNOW IF WE'VE ACTUALLY GOT ANY MONEY. THEY'RE SLOW AS THE DICKENS PAYING.

MR. COHEN: IT DOESN'T AFFECT THE ISSUE. I THOUGHT YOU MIGHT BE --

MR. MAHONEY: THEY ARE STILL DISPUTING THE DISPOSAL FEE IN HAZARDOUS SUBSTANCE TAX. I THINK REASONABLY FROM THEIR PERSPECTIVE THOSE ARE THE ONES THAT LOOK MORE LIKE TAXES THAN FEES.

MR. LAUTANEN: I LOOK AT IT NOW IT'S CALLED A FEE. I RECOGNIZE IT --

MR. COHEN: IT STILL COMES OUT OF YOUR POCKET.

MR. LAUTANEN: THAT'S RIGHT. I LOOK AT IT AND SAY IT'S A PRETTY SHORT HOP FROM HERE TO THERE. I THINK IT'S AN ARGUMENT AND ISSUE CERTAINLY WORTH CONSIDERING IN THE CONTEXT OF THIS CASE.

MR. COHEN: I HAVE ONE QUESTION BEFORE YOU GET STARTED. MAYBE YOU WERE GOING TO COVER IT. AND THAT IS THAT -- ARE YOU SAYING THAT BY CONTRACT THE INCIDENCE OF THE FEE CAN BE SHIFTED? OR AT LEAST THAT WAS THE IMPRESSION I GOT FROM MR. --

MR. MAHONEY: WELL, THAT IS NOT THE MAIN FOCUS OF OUR ARGUMENT. THAT WAS SOMETHING THAT THE EPA SEEMED TO INDICATE IN THE FEDERAL REGISTER NOTICE. I BELIEVE THAT WHAT WAS BEING REFERRED TO WAS NOT ACTUALLY A FORMAL REGULATION IN THE SENSE OF SOMETHING THAT HAD BEEN PROMULGATED IN THE CODE OF FEDERAL REGULATION. I THINK WHAT JOAN CITED WAS SOME GUIDES IN THE FEDERAL REGISTER WHICH STATED WHEN TWO OR MORE PARTIES ARE INVOLVED, THEY SHOULD AGREE TO HAVE ONE PARTY ACT AS THE GENERATOR. AND IN THAT CASE THE EPA WOULD LOOK TO THAT AGREED-UPON PERSON AS BEING THE GENERATOR. ALTHOUGH THAT'S NOT THE MAIN FOCUS OF OUR ARGUMENT, WE DO THINK TO THE EXTENT THAT A FEDERAL AGENCY ENGAGED IN SIMILAR PRACTICES, THAT OUR STATE AGENCY HAS PROVIDED SOME GUIDANCE, WE DO BELIEVE THAT'S RELEVANT.

MR. COHEN: THE REASON I ASK IS IT'S DIRECTLY OPPOSITE TO SALES AND USE TAX APPROACH. THERE MAY BE CO-LIABILITY IN CERTAIN SITUATIONS, BUT IF THERE'S SINGLE

LIABILITY IT CAN'T BE SHIFTED BY CONTRACT.

MR. MAHONEY: WELL, WE WOULD NOT SAY NECESSARILY IT'S SHIFTING. BECAUSE WHAT THE EPA WENT ON TO SAY IN THE FEDERAL REGISTER IS THAT ALTHOUGH EPA WOULD LOOK TO THE ONE WHO HAD AGREED TO BE THE GENERATOR AS BEING THE GENERATOR, IT WAS RESERVING THE RIGHT TO ENFORCE AGAINST ANY PERSON WHO FITS THE DEFINITION OF "GENERATOR." SO I READ WHAT EPA WAS DOING WAS SAYING THAT ALL RIGHT, IF WE HAVE TO SINGLE OUT ONE PERSON, IT WILL BE THE PERSON THAT AGREED TO IT. BUT THAT DOESN'T MEAN UNDER SOME CIRCUMSTANCES WE WOULD NOT STILL GO AFTER THE OTHER PERSON AS APPROPRIATE. SO WE'RE NOT SAYING THAT LIABILITY SHIFTED.

MR. COHEN: THAT WAS THE FIRST QUESTION THAT CAME TO MIND.

YOU WANT TO GO AHEAD AND RESPOND?

MR. MAHONEY: I WOULD LIKE TO ASK A QUESTION, A FACTUAL QUESTION. IN THE COURSE OF CLEANING OUT THE BILGES, WAS THERE SOAPY WATER INTRODUCED?

MR. LAUTANEN: YES.

MR. MAHONEY: AND THAT WAS ULTIMATELY PART OF WHAT WAS REMOVED AND MANIFESTED --

MR. AUSTIN: I WOULD CLARIFY. IT DEPENDS.

MR. MAHONEY: SO IN SOME CASES THERE WERE, IN SOME CASES THERE WEREN'T.

MR. AUSTIN: YOU DON'T NECESSARILY NEED SOAPY WATEI

INTRODUCED IN A SYSTEM TO CLEAN IT. SOMETIMES YOU JUST NEED TO VACUUM IT UP WITH A PUMP.

MR. MAHONEY: SO THAT MAY OR MAY NOT HAPPEN.

MR. AUSTIN: THAT'S CORRECT.

MR. MAHONEY: BEFORE I MAKE MY COMMENTS, I'LL JUST SAY VERY BRIEFLY THAT I WAS VERY INTERESTED TO HEAR THAT THE NAVY CALLS IN SOUTHWEST MARINE NOW TO DO SOME PAINTING ON THE SHIPS, BECAUSE I SPENT MY OWN THREE YEARS OUT AT 32ND STREET AND MY ARM USED TO GET SORE FROM THE PAINT BRUSH.

MR. LAUTANEN: YOU'RE PERFECT FOR THIS CASE.

MR. COHEN: DOES THAT MEAN YOU'RE BIASED?

MR. MAHONEY: ALL I CAN SAY IS THE NAVY IS GETTING SOFT NOWADAYS IF THEY HIRE OUT THE PAINT.

ALL RIGHT. TO CLARIFY THE POSITION OF THE DEPARTMENT, WE BELIEVE THAT SOUTHWEST MARINE IS LIABLE FOR THE ENTIRE GENERATOR FEE IN CONNECTION WITH ITS REMOVAL OF THE HAZARDOUS WASTE INCLUDING THE LARGE QUANTITIES OF WASTE WATER FROM THE NAVY VESSELS.

SOUTHWEST MARINE ASSERTS THAT THE NAVY IS THE GENERATOR, AND WE WOULD AGREE THAT IT IS POSSIBLE THAT THE NAVY IS A COGENERATOR. AGAIN, WE'RE NOT TAKING A FIRM POSITION ON THAT HERE BECAUSE FOR THE SIMPLE REASON THAT THAT'S NOT AT ISSUE. BUT WE WOULD RECOMMEND THAT IF SOUTHWEST MARINE BELIEVES THAT THE NAVY IS LIABLE, THEN IT MAY WISH TO SEEK CONTRIBUTION OR INDEMNITY FROM THE NAVY. BUT THERE'S NO REASON WHY SOUTHWES

MARINE COULD NOT ALSO HAVE LIABILITY WITH RESPECT TO THE BOARD OF EQUALIZATION AND TO THE DEPARTMENT.

TITLE 22 ESTABLISHES THAT THERE ARE TWO AVENUES FOR ACQUIRING GENERATOR STATUS. AND IT'S ONLY NECESSARY TO FOLLOW EITHER OF THE TWO AVENUES IN ORDER TO BE A GENERATOR. THE TWO AVENUES ARE, FIRST, PRODUCING THE WASTE, AND SECOND WOULD BE INITIALLY SUBJECTING IT TO REGULATION. ACCORDING TO THE FACTUAL DATA THAT WAS OBTAINED BY THE BOARD'S -- I ASSUME IT WAS THEIR AUDITORS, ABOUT HALF THE WASTE WATER AT ISSUE WAS PRODUCED FROM SOAPY WATER WHICH WAS INTRODUCED FROM SOUTHWEST MARINE.

MR. COHEN: DO YOU SAY HALF?

MR. MAHONEY: THAT WAS THE FIGURE I UNDERSTOOD WAS HALF.

MR. LAUTANEN: WE WOULD DISPUTE THAT FACTUALLY.

MR. MAHONEY: FOR THE MOMENT WE'LL SAY THAT A PERCENTAGE OF THE WASTE WAS PRODUCED BY SOAPY WATER. THE WASTE WATER IS DIFFERENT FROM THE ORIGINAL SLUDGE WHICH CONTAMINATED THE WATER. IT DOES CONTAIN THE SAME HAZARDOUS MOLECULES, BUT IT HAS DIFFERENT PROPERTIES AND IT'S SIGNIFICANTLY GREATER IN QUANTITY. WHEREAS BEFORE THERE WAS A SMALL VOLUME OF WASTE, ONCE THE WATER IS INTRODUCED, SUDDENLY THERE'S A LARGE VOLUME OF WASTE WHICH COULD POTENTIALLY CREATE SEPARATE PROBLEMS IF NOT HANDLED PROPERLY.

I THINK IT'S CLEAR WHEN WE TALK ABOUT WASTE WATER CAUSED BY THE INTRODUCTION OF THE SOAPY WATER, WE'RE TALKING

ABOUT A SEPARATE WASTE STREAM FROM THE ORIGINAL SLUDGE THAT WAS IN THE BILGES AND THAT SOUTHWEST MARINE WOULD BE THE PRODUCER OF THAT WASTE STREAM, THEREFORE WOULD BE THE GENERATOR.

NOW, AS TO THE BILGE WATER AND THE CERTAIN OTHER RESIDUES THAT EXISTED EVEN BEFORE SOUTHWEST MARINE ENTERED THE PICTURE, I THINK THE ISSUE TURNS ON WHO FIRST SUBJECTED THE WASTE TO REGULATION, AND THAT'S A LITTLE MORE COMPLEX. IF I UNDERSTAND SOUTHWEST'S ARGUMENT, THEY'RE SAYING THE NAVY PRODUCED THE WASTE AND THEREFORE BY PRODUCING IT, THEY'RE THE ONES WHO SUBJECTED IT TO REGULATION. AND I THINK THAT'S AN UNDERSTANDABLE MISTAKE, BECAUSE UNDER CERTAIN CIRCUMSTANCES THE DEPARTMENT WOULD HAVE HAD THE AUTHORITY TO TAKE REMEDIAL MEASURES WHILE THE SUBSTANCES WERE ON BOARD THE SHIP. FOR EXAMPLE, IF SOMEBODY NOTICED THE BILGE WATER WAS LEAKING INTO THE BAY, THEN THE DEPARTMENT WOULD HAVE ORDERED A CLEANUP TO PREVENT FURTHER SPREAD OF THE CONTAMINATION.

BUT THAT SAME TYPE OF AUTHORITY IS TRUE OF ANY HAZARDOUS WASTE ONCE IT'S BEEN PRODUCED. IF SOMETHING IS A HAZARDOUS WASTE, IT'S ALWAYS POSSIBLE TO HAVE AREAS WHERE THE DEPARTMENT MAY TAKE SOME TYPE OF ENFORCEMENT OR REMEDIAL ACTION REGARDING THIS. THAT'S NOT WHAT TITLE 22 MEANS BY SUBJECTING THE WASTE TO REGULATION. IF THAT HAD BEEN WHAT IT MEANT, THERE WOULD HAVE BEEN NO NEED FOR IT TO MENTION THE SECOND PRONG ABOUT FIRST SUBJECTING THE WASTE TO REGULATION. THE REGULATION WOULD HAVE SIMPLY DEFINED "GENERATOR" AS BEING THE PERSON WHO PRODUCES

THE WASTE AND STOP RIGHT THERE. IT'S CLEAR BY THE FACT THAT, YOU KNOW, THERE IS MORE THAN ONE PRONG THAT IT'S POSSIBLE THAT THE GENERATOR CAN BE SOMEONE OTHER THAN THE PERSON WHO PRODUCED IT.

I THINK THE BOARD OF EQUALIZATION, THE FULL BOARD, HAS PROVIDED SOME GUIDANCE, AS IS DISCUSSED IN OUR BRIEF AND IS DISCUSSED ALREADY HERE IN THE SANTA CLARA RANCH'S APPEAL. THE BOARD HELD THAT WASTE IN CONTAMINATED SOIL DID NOT BECOME SUBJECT TO OUR REGULATION UNTIL IT WAS REMOVED. AND IT DIDN'T MATTER IN THAT PARTICULAR CASE IF THE CONTAMINATED SOIL HAD POSED A DANGER. THE DEPARTMENT COULD HAVE ISSUED A CLEANUP ORDER, WHICH IT COULD HAVE.

I THINK THE SITUATION IS VERY ANALAGOUS. IT WAS THE REMOVING OF WASTE THAT TRIGGERS THE REGULATORY PROCESS, BEGINNING WITH THE INTRODUCTION OF THE WASTE THROUGH THE MANIFEST SYSTEM. THE DISTINCTIONS THAT WERE MENTIONED -- OF COURSE THERE ARE FACTUAL DISTINCTIONS, BUT I DON'T READ THOSE FACTUAL DISTINCTIONS AS BEING ANYTHING THAT THE BOARD RESTED IT SANTA CLARA RANCH'S DECISION ON.

FIRST OF ALL, SANTA CLARA RANCH, THE PROPERTY OWNE WAS THE PERSON WHO WAS ULTIMATELY FOUND LIABLE. WHO ARRANGED T HAVE THE WASTE EXCAVATED WAS PROPERTY OWNER. THERE'S NO MENTIC OF PROPERTY OWNERSHIP OF BEING A RELATIVE FACTOR IN ANY AUTHORITY I'M AWARE OF. IT'S NOT MENTIONED IN SANTA CLARA RANCH. IT DOESN'T COME UP WITH THE REGULATION. IT IS A

DISTINCTION, BUT IT IS A DISTINCTION THAT HAS NO BEARING ON THE ISSUE HERE OF -- AT LEAST NOT THE ISSUE PRESENTED IN THIS CASE OF WHAT DOES IT MEAN TO FIRST PUT A WASTE INTO REGULATION.

SIMILARLY, THE ISSUE OF THE CONTRACT, YOU KNOW, AS WE DISCUSSED SANTA CLARA RANCH DID NOT GO INTO THE ISSUES OF THE CONTRACTOR'S LIABILITY. THE ISSUE THERE WAS AS BETWEEN THE PERSON WHO EXCAVATED THE WASTE AND THE PREVIOUS OWNER OF THE PROPERTY, WHO APPARENTLY WAS THE ONE WHO HAD SPILLED THE WASTE. BUT WHAT WE'RE LOOKING AT IS WHAT IS IT THAT PUTS THE WASTE INTO REGULATION. THAT WAS THE THING THAT WAS LOOKED AT BY THE BOARD. I THINK OUR BRIEF QUOTES THEIR LANGUAGE WHERE THEY MAKE IT CLEAR THAT IT'S AFTER THE REMOVAL, THAT'S THE THING THAT PUTS IT INTO REGULATION. AND I THINK THAT'S WHAT WE NEED TO FOCUS ON.

JUST A COUPLE OF MINOR POINTS. IN TERMS OF WHETHER THE DIRT WAS WASTE IN SANTA CLARA RANCH, AGAIN WE WOULD BE -- TO ASSUME THAT WHETHER THE DIRT WAS WASTE OR NOT, I'M NOT SURE WHAT THE RELEVANCE OF THAT IS. I SUPPOSE IT WOULD ONLY BE RELEVANT IF WE ASSUMED THAT PRODUCING THE WASTE MADE YOU -- WAS THE ONLY WAY YOU COULD BE A GENERATOR AND THEREFORE YOU HAD TO LOOK TO SEE IF IT WAS WASTE BEFORE IT WAS EXCAVATED. BECAUSE IF -- BECAUSE IF IT WASN'T -- BECAUSE IF IT WAS ALREADY WASTE, THEN OBVIOUSLY THE PERSON WHO EXCAVATED IT ISN'T PRODUCING WASTE.

BUT, YOU KNOW, AGAIN, THAT'S -- YOU KNOW, THAT'S NOT WHAT WE'RE SAYING HERE. WHAT WE'RE SAYING IS IT DOESN'T MATTER WHETHER IT WAS WASTE WHILE IT WAS IN THE GROUND OR NOT

BECAUSE THE QUESTION IS WHO SUBJECTED IT TO REGULATION BY REMOVING IT. SIMPLY THE FACT THAT IT HAD BEEN PRODUCED DOESN'T MEAN IT'S UNDER REGULATION ACCORDING TO THE TERM THAT'S USED IN TITLE 22.

I WOULD ALSO SAY I THINK IF THE DIRT WAS WASTE, IT WOULD CERTAINLY BE SUBJECT TO A CLEANUP ORDER BY US --

MR. COHEN: WOULDN'T THAT MEAN THE SPILL ITSELF IS THE ACT THAT MAKES IT SUBJECT TO REGULATION?

MR. MAHONEY: NOT THE TYPE OF REGULATION THAT TITL 22 IS REFERRING TO.

MR. COHEN: YOU'RE SPEAKING IN TERMS OF THE ORIGINAL SPILL WOULD MAKE IT SUBJECT TO CLEANUP ORDERS, WHICH I A DIFFERENT PART OF THE LAW THAN THE FEE.

MR. MAHONEY: EXACTLY. THE ORIGINAL SPILL WOULD MAKE IT SUBJECT TO A CLEANUP ORDER IF A DANGER OCCURRED. EVERY WASTE THAT'S IN THE GROUND ISN'T NECESSARILY SUBJECT TO A CLEANUP ORDER. IT COULD HAVE BEEN IF IT HAD BEEN -- IF WE HAD DISCOVERED THERE WAS A DANGER. AND IN THE CASE OF THE NAVY VESSELS, SAME THING, IT COULD HAVE BEEN SUBJECT TO A CLEANUP ORDER IF THERE HAD BEEN SOME SORT OF SPILL. BUT THAT DIDN'T OCCUR.

AND MY OWN COMMENT ON THE ISSUE OF WHETHER OR NOT THIS WAS A TAX ON THE NAVY, I BELIEVE THAT WAS A CONSTITUTIONAL ARGUMENT SAYING THAT THE TAX AS APPLIED TO THE NAVY IS UNCONSTITUTIONAL OR IF NOT A CONSTITUTIONAL ARGUMENT, PERHAPS A

BETTER WAY IS A PREEMPTION BY FEDERAL LAW. I THINK ARTICLE 3, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION MAKES IT CLEAR THAT PREEMPTION-BY-FEDERAL-LAW ARGUMENTS IS NOT RELEVANT AT THE ADMINISTRATIVE HEARING STAGE.

THAT WOULD BE ALL THAT I HAVE AT THIS POINT.

MR. COHEN: I HAVE ONE QUESTION WHICH MAY OR MAY NOT BE PERTINENT. THAT IS THIS WAY IS TO DTSC ESTIMATED THAT HALF OF THE WASTE HERE WAS SOAPY WATER. DO YOU HAVE A DIFFERENT FIGURE IN THAT?

MR. AUSTIN: I CAN GIVE YOU I THINK A GENERAL DESCRIPTION. BUT THE -- WHEN SHIP SYSTEMS LEAK, THE MAJORITY OF THE MATERIAL THAT GOES INTO THE BILGES IS WATER AND THE MINORITY IS OIL. AND THAT'S THE PART WHICH IS VACUUMED OUT AND IN SOME CASES --

MR. COHEN: THAT'S THE PART THAT'S VACUUMED OUT. ISN'T EVERYTHING VACUUMED OUT?

MR. AUSTIN: EVERYTHING IS ULTIMATELY VACUUMED OUT, CARRIED BY A PUMP THROUGH A HOSE. OCCASIONALLY DETERGENT MIGHT BE INTRODUCED TO EMULSIFY THE OIL TO BETTER CLEAN THE BILGES. THE INTRODUCTION OF CLEANING FLUIDS WOULD ONLY BE DONE IN THE CASE OF SLUDGES AS OPPOSED TO FLUIDS IN THE BILGES OR IN THE PROCESS OF CLEANING THE TANKS.

MR. COHEN: SO IF THE OIL HAD THICKENED TO THE POINT WHERE IT WAS KIND OF TARRY, YOU NEED SOMETHING TO GET IT OUT.

MR. AUSTIN: THAT'S RIGHT.

MR. COHEN: BUT THIN HYDRAULIC OIL, YOU WOULDN'T.

MR. AUSTIN: MOST OF THE TIME IT'S WATER CONTAMINATED WITH OIL THAT TENDS TO REMAIN. AND THE ONLY OTHER CLEANING PROCESS WHICH GENERATES THESE TYPE OF FLUIDS FROM THE SHIPS WOULD BE THE CLEANING OF TANKS, WHICH WATER MAY BE INTRODUCED AT HIGH PRESSURE, LITERALLY PEELS IT OFF THE SIDES OF THE TANK AND THEN THAT SLUDGE AND WATER MIXTURE WOULD BE VACUUMED OUT TO BE SEPARATED. THE SHIPS DO A GOOD ENOUGH JOB OF INTRODUCING WATER INTO THE BILGES THEMSELVES. WE DON'T USUALLY HAVE TO INTRODUCE MORE IN ORDER TO REMOVE --

MR. COHEN: WHEN YOU ADD DETERGENT, DO YOU ADD THAT IN THE SOLUTION OR DUMP ALL --

MR. AUSTIN: IT COULD BE FROM INTRODUCING IT IN A HOLD THROUGH LITERALLY PUTTING A DETERGENT IN, SWIPING IT AROUND WITH A MOP.

MR. COHEN: DO YOU HAVE ANY KIND OF AN ESTIMATE OF YOUR OWN? OBVIOUSLY THE HALF NUMBER THAT MR. MAHONEY MENTIONED IS AN ESTIMATE.

MR. AUSTIN: IT WOULD DEPEND ON THE JOB AND THE SHIP. MY GUESS WOULD BE LOOKING AT A 90 PERCENT/10 PERCENT. 90 PERCENT GENERATOR WATER COMES FROM THE SHIP SYSTEMS THEMSELVES. 10 PERCENT MAY COME FROM THE INTRODUCTION OF OUR SUBCONTRACTORS WHO MAINTAIN THE BILGES AND CLEAN TANKS.

MR. COHEN: I'M GUESSING NOW IF THIS WERE TO BE A

CONTROLLING ISSUE, THERE WOULD BE NO REAL WAY OTHER THAN ESTIMATES, THERE'S NO REAL WAY --

MR. AUSTIN: IT'S NOT TRACKED.

MR. COHEN: IT WOULD BOIL DOWN TO --

MR. AUSTIN: THAT'S RIGHT.

MR. COHEN: -- WHO HAS A BETTER ESTIMATE.

MR. MAHONEY: WE BASED THE 50 PERCENT FIGURE ON A STAFF ANALYSIS BY THE SPECIAL TAXES DIVISION, WHICH STATED APPROXIMATELY 50 PERCENT OF THE CONTAMINATED BILGE WATER WAS WATER USED IN THE SHIP AND ENGINE COMPARTMENT AND COOLING SYSTEM. THE REMAINING 50 PERCENT OF THE WATER WAS INTRODUCED BY SOUTHWEST MARINE WITH REPAIR AND CLEANING PERFORMED BY SOUTHWEST MARINE. OBVIOUSLY WE HAVEN'T SENT PEOPLE OUT TO WATCH THE PROCESS FOR THE RECORDS. THAT IS THE BASIS FOR OUR FIGURE.

MR. LAUTANEN: THAT'S PART OF THE FACTUAL PROBLEM WE'RE HAVING. WE DON'T KNOW WHERE THAT NUMBER CAME FROM AND WE DON'T BELIEVE--AND I THINK YOU'D AGREE--THAT NO ONE HAS EVER VISITED THE FACILITY.

MR. COHEN: CERTAINLY NO ONE HAS EVER MEASURED IT.

MR. LAUTANEN: RIGHT. RIGHT.

MR. MAHONEY: IT MAY HAVE BEEN A VISIT BUT --

MR. LAUTANEN: NOBODY CAN REMEMBER THAT HAPPENING.

MR. COHEN: DO YOU HAVE ANY MORE INFORMATION ON THAT?

MR. MAHONEY: I DON'T KNOW FOR SURE. I JUST SAY

AUDITORS REGULARLY VISIT THE FACILITIES. I DON'T HAVE PERSONAL KNOWLEDGE.

MR. LAUTANEN: IF I CAN CLARIFY ONE POINT YOU MADE AS FAR AS THE INTRODUCTION OF THE SOAPY WATER. YOU MADE THE COMMENT ABOUT THROWING SOAP AND MOPPING IT AROUND, THAT TYPE OF THING. WOULDN'T THAT TYPICALLY BE DONE BY NAVY PERSONNEL?

MR. AUSTIN: IT COULD BE DONE, THAT'S TRUE, NAVY PERSONNEL ON THE SHIP CONDUCTING REPAIR OPERATIONS AND CLEANUP ALL THE TIME ALONG WITH US.

MR. LAUTANEN: WHILE IT'S IN THE FACILITIES.

MR. COHEN: I WOULD ASSUME THEY WOULDN'T ALLOW IT TO STAND EMPTY.

MR. AUSTIN: VERY TYPICALLY IT'S FUNCTIONAL TO THE POINT WHERE HUNDREDS OF MEN ARE LIVING ON BOARD EATING, SHOWERING, AND WORKING, AS YOU POINTED OUT.

MR. MAHONEY: I'M GLAD TO SEE SOMEONE IS WORKING.

MR. COHEN: JUST BECAUSE YOU HAD TO DO THE WORK.

MR. MAHONEY: RIGHT.

MR. COHEN: ANYBODY HAVE ANYTHING MORE TO ADD?

MR. LAUTANEN: I JUST HAVE ONE POINT IN CLOSING.

I THINK THE BOARD, YOU KNOW, PROPERLY EMPHASIZES THE EPA INTERPRETATION HERE OUGHT TO BE GIVEN A GREAT DEAL OF WEIGHT. AND YOU EMPHASIZED THAT IN CITING THE REGULATION AND THE LEGISLATIVE HISTORY BEHIND THE REGULATION. I AGREE WITH THAT. I FIND THE ARGUMENT OR THE STATEMENT THAT THE NAVY ISN'T

SUBJECT TO REGULATION, I FIND THAT A LITTLE DIFFICULT TO SWALLOW. AND I DON'T THINK THAT THE EPA HAS INTERPRETED THE REGULATION IN THAT MANNER.

ONE OF THE EXHIBITS TO OUR PETITION, IT'S EXHIBIT K, IS A LETTER FROM THE EPA DATED FEBRUARY 5TH, 1986, WELL AFTER THE PROMULGATION OF THE REGULATION THAT YOU SAY TO A VICE ADMIRAL IN THE NAVY. AND I'D LIKE TO QUOTE IF I MAY. JUST A SHORT SENTENCE FROM PAGE 3 OF THAT LETTER.

MR. COHEN: WHAT'S THE DATE OF THAT LETTER?

MR. LAUTANEN: THAT'S FEBRUARY 5TH, 1986, AND THAT WOULD BE EXHIBIT K TO OUR PETITION.

MR. COHEN: OKAY.

MR. LAUTANEN: AND THE LANGUAGE THAT I WOULD EMPHASIZE APPEARS IN THE LAST FULL PARAGRAPH ON THAT PAGE WHERE THE EPA SAYS: ENGINE-RELATED WASTES ARE TREATED QUITE DIFFERENTLY FROM WASTES THAT ARE IN TRANSPORT TANKS IN THAT THEY ARE REGULATED FROM THE MOMENT THEY ARE PRODUCED. SINCE THE OPERATION OF THE SHIP'S PROPULSION SYSTEM PRODUCES THE OILY WASTE, THE SHIP'S OWNER AND/OR OPERATOR ARE GENERATORS. THE FACILITY INVOLVED IN REMOVING THIS WASTE FROM THE SHIP IS NOT A GENERATOR BECAUSE IT IS NOT CAUSING THE WASTE TO BECOME SUBJECT TO REGULATION. THIS WASTE IS ALREADY SUBJECT TO REGULATION WHEI PRODUCED IN THE SHIP.

I READ THAT LANGUAGE. I THINK THAT'S PRETTY CLEAR YOU KNOW, THAT'S THE EPA INTERPRETING THE CITED REGULATION SIX

YEARS AFTER PROMULGATION. I READ THAT AND I SAY THAT'S US. SO I WANT TO RESPECTFULLY DISAGREE WITH YOUR ARGUMENT THAT THE NAVY IS NOT SUBJECT TO REGULATION ON THIS STUFF.

MR. MAHONEY: WELL, YOU KNOW, I WOULD JUST SAY A COUPLE THINGS IN CLOSING.

I DON'T KNOW WHAT WE WOULD HAVE DONE WITH THAT WASTE IN THERE. CERTAINLY IT WOULD NOT BE PART OF OUR ROUTINE REGULATORY PROCESS. YOU KNOW, HAD SOMEBODY REPORTED AN OIL SPILL, YEAH, THEN I THINK WE WOULD HAVE GONE AND CLEANED IT UP. YOU KNOW, BUT I CAN ONLY REPEAT THAT THE SAME IS TRUE OF ANYTHING THAT'S A HAZARDOUS WASTE. I DON'T THINK WE CAN INTERPRET TITLE 22 IN SUCH A WAY TO MAKE THE SECTION THAT REFERS TO MAKING WASTE SUBJECT TO REGULATION, I DON'T THINK WE CAN INTERPRET THAT IN SUCH A WAY TO MAKE THAT MERE SURPLUSAGE THERE IS A SENSE ONCE THE WASTE IS PRODUCED, AS SOON AS IT BECOMES A HAZARDOUS WASTE, THERE COULD BE SOME CIRCUMSTANCE WHERE SOMETHING MIGHT HAPPEN TO IT WHERE WE WOULD GET INVOLVED. THAT'S CLEARLY NOT WHAT TITLE 22 IS REFERRING TO.

THE ONLY OTHER THING I WOULD SAY IS THAT I DO HAVE SOME SYMPATHY WITH SOUTHWEST'S POSITION. THEY DO FEEL THAT THEY'RE BEING STUCK WITH LIABILITY FOR SOMETHING THAT THE NAVY WAS AT LEAST IN PART RESPONSIBLE FOR. YOU KNOW, MY ONLY SUGGESTION IS THAT PERHAPS THEY SHOULD CONSIDER TRYING TO RECOVER A PORTION OF THEIR GENERATOR FEE FROM THE NAVY. PERHAPS THEY WOULD THINK ALL OF IT. IF SO, I WISH THEM BETTER LUCK THA

WE'VE HAD DEALING WITH THE MILITARY.

TO SUM IT UP IN ONE SENTENCE, WE WOULD SAY THAT EVEN IF THE NAVY IS A GENERATOR, THAT WOULD NOT PRECLUDE SOUTHWEST MARINE FROM BEING A GENERATOR ALSO.

MR. COHEN: LET ME GET A MORE DETAILED INTERPRETATION OF WHAT HAPPENS. NOW, THERE WAS TALK ABOUT I THINK YOU SAID CAKE THAT SETTLES IN THE BOTTOM. YOU PUMP MATERIAL OUT OF THE BILGE --

MR. AUSTIN: YES, SIR.

MR. COHEN: IT GOES INTO A HOLDING TANK.

MR. AUSTIN: YES, SIR.

MR. MAHONEY: YOU OWN THE HOLDING TANK.

MR. AUSTIN: OUR SUBCONTRACTOR OWNS THE HOLDING TANK.

MR. COHEN: IT SITS THERE AND PRESUMABLY THE HEAVIES GO TO THE BOTTOM, THE LIGHTS GO TO THE TOP.

MR. AUSTIN: WATER GOES TO THE MIDDLE, RIGHT.

MR. COHEN: OKAY. WHATEVER. AND IS ANY FRACTION OF THAT THEN NOT HAZARDOUS?

MR. AUSTIN: THE WATER ROUTINELY ISN'T, AT THAT POINT BECOMES NONHAZARDOUS WASTE.

MR. COHEN: THAT WOULD BE THE CENTER PART.

MR. AUSTIN: CENTER, YES.

MR. COHEN: AND YOU DISPOSE OF IT HOW?

MR. AUSTIN: UNDER PERMIT TO THE SAN DIEGO

METROPOLITAN SEWER DISTRICT.

MR. COHEN: IS THIS PART OF THE AMOUNT THAT'S BEING TAXED?

MR. AUSTIN: I KNOW THE ANSWER TO THAT. NO, IT'S NOT.

MR. COHEN: I'M USING THE WORD "TAXED." FEES, WHATEVER.

MR. AUSTIN: UH-HUH.

MR. COHEN: WHEN I WRITE MY REPORT, I TRY TO BE MORE METICULOUS ABOUT SEPARATING FEES AND TAXES. SO THE PART OF THE TOP TENDS TO BE, WHAT, LIGHT OIL?

MR. AUSTIN: YES.

MR. COHEN: THAT IS LESS DENSE IN THE WATER. WHAT DO YOU DO WITH IT THEN?

MR. AUSTIN: THAT GETS SENT TO A RECYCLING FACILITY.

MR. COHEN: AND THAT'S PART OF WHAT THIS --

MR. AUSTIN: THAT'S THE MAJORITY OF WHAT WE WOULD CONSIDER -- WE CONSIDER ALL THIS, YOU KNOW -- TO TRY AN ANALAGOUS SITUATION, WE REMOVE ASBESTOS FROM NAVY SHIPS, TOO. OUR CLAIM IS THEY'RE THE GENERATOR OF THAT MATERIAL AS WELL.

MR. COHEN: UNDER THE HAZARDOUS WASTE MANIFEST.

MR. AUSTIN: YES.

MR. COHEN: THIS IS AGAIN PART OF WHAT IS -- THIS IS WHAT IS PART OF THE DETERMINATION.

MR. MAHONEY: YEAH. IF IT'S BEEN MANIFESTED OUT, IT WOULD BE PART OF THE DETERMINATION.

MR. COHEN: NOW, THE BOTTOM BEING HEAVIER AND MAYBE EVEN SOLID, WHAT DO YOU DO WITH THOSE?

MR. AUSTIN: AT THE END OF THE CONTRACT THE TANK WOULD BE CLEANED. THAT MATERIAL IS DRUMMED AND SENT FOR APPROPRIATE DISPOSAL. IT COULD BE RECYCLING, IT COULD BE FUEL. IT COULD BE ~~REGENERATION.~~ incinerated BUT IT IS SEPARATED OUT AS HAZARDOUS WASTE.

MR. COHEN: NOW, WHICH PART DID YOU PAY THE FEES ON OR FOR REFUND?

MR. AUSTIN: EVERYTHING BUT THE WATER.

MR. COHEN: PART IS A CLAIM FOR REFUND, PART IS A BILLING FOR ADDITIONAL FEES.

MR. LAUTANEN: BOTH ARE INCLUDED IN BOTH.

MR. COHEN: YOU PAID AN AMOUNT -- YOU SELF-REPORTED AN AMOUNT WHICH -- HOW DID YOU ARRIVE AT WHAT YOU SELF-REPORTED

MR. AUSTIN: BY TOTALING THE AMOUNT ON THE HAZARDOUS WASTE MANIFEST.

MR. COHEN: THAT WOULD MEAN THAT THE WHOLE AMOUNT WOULD BE UNDER CLAIM. I DON'T FOLLOW.

MR. AUSTIN: WELL, ALL THE OIL BUT NOT THE WATER.

MR. COHEN: WELL, NOW, I JUST GOT THE ANSWER THAT THE WATER WAS NOT BEING TAXED.

MR. MAHONEY: THE WATER WAS SUBJECT TO THE FEE.

MR. COHEN: EVEN THOUGH IT'S GOING INTO THE SEWER. DIDN'T YOU SAY THE WATER WAS NOT TAXED, OR YOU DID NOT REPORT THE TAX?

MR. AUSTIN: THE WATER IS NOT REPORTED. THE TOTAL AMOUNT OF MATERIAL THAT IS REPORTED ON HAZARDOUS WASTE MANIFESTS CONSISTS ONLY OF THAT MATERIAL WHICH LEAVES THE FACILITY UNDER HAZARDOUS WASTE MANAGER.

MR. COHEN: YOU SELF-REPORTED THAT, AND THAT'S WHAT YOU'RE FILING A CLAIM FOR REFUND.

MR. AUSTIN: THAT'S CORRECT.

MR. COHEN: AND THE AMOUNT NOT SELF-REPORTED IS THE WATER.

MR. MAHONEY: THE REPORTS WE HAVE ARE THAT IT INCLUDED BILGE WATER, CONTAMINATED BILGE WATER.

MR. AUSTIN: THE INITIAL SELF-DECLARATION IN 1988, WHICH IS PRIOR TO WHEN I WAS THERE, IS INCORRECT. THE AMOUNT CHECKED ON THE TAX FORM WAS AN INCORRECT REPORTING OF THE AMOUNT THAT WAS SENT OUT UNDER HAZARDOUS WASTE MANIFEST. AS PART OF OUR CLAIM, WE WENT BACK AND PRESENTED THE TOTAL AMOUNTS FOR ALL OF THE HAZARDOUS WASTE THAT CAME OFF THE SITE AT THAT TIME, WHICH WAS MORE THAN WAS ORIGINALLY SELF-REPORTED. SO THE REDETERMINATION WAS FOR THE DIFFERENCE IN THOSE TWO AMOUNTS.

MR. COHEN: TO OVER-SIMPLIFY, THE DETERMINATION IS IN FACT FOR CLERICAL ERRORS.

MR. AUSTIN: YES. YES, SIR. THAT'S ALL IT'S FOR,

FOR CLERICAL ERRORS. SOUTHWEST MARINE MADE A MISTAKE WHEN IT ORIGINALLY IN 1988 REPORTED WHAT WAS SENT OUT ON HAZARDOUS WAST MANIFESTS.

MR. COHEN: SO YOU WERE -- LET ME MAKE UP SOME NUMBERS. YOU WERE REPORTING 10 TONS. ACTUALLY THERE WERE 11 TONS AND SO THE -- YOU WERE ISSUED A BILL FOR THE ADDITIONAL --

MR. AUSTIN: ONE TON.

MR. COHEN: TON. AND IN THE MEANTIME YOU DECIDED NONE OF IT WAS TAXABLE.

MR. AUSTIN: THAT'S RIGHT.

MR. MALBOUVIER: WASN'T THE AMOUNT 2594 -- I WAS JUST SAYING --

MR. COHEN: OKAY. I UNDERSTAND THE DIFFERENCE BETWEEN THE CLAIM AND THE PETITION, WHICH WAS WHAT I WAS TRYING TO -- ALL RIGHT.

ANYBODY HAVE ANYTHING ELSE?

MR. AUSTIN: I THINK I WOULD LIKE TO IF I COULD CLARIFY AN ISSUE ON -- FROM OUR PERSPECTIVE ON WHEN A MATERIAL BECOMES SUBJECT TO REGULATION. IN TITLE 22 FOR A MATERIAL TO B SUBJECT TO THE HAZARDOUS WASTE REGULATIONS, IT FIRST HAS TO MEE TWO STATUTORY DEFINITIONS. IT HAS TO BE HAZARDOUS AND IT HAS T BE A WASTE. LOTS OF MATERIAL ARE HAZARDOUS WHICH ARE NOT WASTE AND THEREFORE ARE NOT SUBJECT TO REMOVAL OR SUBJECT TO THE REGULATIONS UNTIL THEY BECOME A WASTE. THOSE KIND OF EXAMPLES ABOUND. CERTAINLY THE SOIL IN SANTA CLARA RANCH SERVED A USEFU

PURPOSE AND DID NOT MEET THE STATUTORY DEFINITION OF WASTE AND THEREFORE WAS NOT SUBJECT TO TITLE 22 REQUIREMENTS. NO 90-DAY STORAGE, DIDN'T HAVE TO BE CONTAINED, DIDN'T HAVE TO BE PROTECTED BY ENVIRONMENTAL DISPOSURE. IT WAS CLEARLY HAZARDOUS BUT IT WAS NOT A WASTE AND THEREFORE NOT SUBJECT TO THE REGULATIONS. ANYTIME A MATERIAL MEETS THOSE TWO STATUTORY DEFINITIONS, IT BECOMES SUBJECT TO THE REGULATIONS.

THE SECOND ISSUE IS THAT IN THE DEFINITION OF GENERATOR, THE TERM SUBJECT TO THE REGULATION IS DEFINED OR TIE TO THE WORD "BY SITE." THAT'S WHY THE CONTRACTOR WHO ACTUALLY DUG THE MATERIAL UP IN SANTA CLARA DID NOT BECOME THE GENERATOR OF THAT MATERIAL BECAUSE HE WAS NOT BY SITE AS REQUIRED UNDER THE DEFINITION OF "GENERATOR."

NOW, IN THE NAVY'S CASE, CLEARLY A SHIP IS A SITE. AND SINCE SOUTHWEST MARINE IS NOT BY SITE, WE'RE NOT THE OWNER OR THE OPERATOR OF THE VESSELS, WE CANNOT MAKE THE MATERIAL SUBJECT TO THE REGULATIONS. THERE'S NOTHING WE CAN DO BECAUSE WE'RE NOT BY SITE MAKING THE MATERIALS SUBJECT TO THE REGULATIONS EXCEPT UNDER THE ONE EXCEPTION THAT CALIFORNIA AND THE FEDERAL GOVERNMENT APPLY, WHICH SAYS IF YOU ARE A TRANSPORT VEHICLE OR VESSEL, WE'LL IN THESE CERTAIN CASES MAKE YOU SUBJEC TO THE REGULATION BY YOUR ACT OF REMOVAL. AND THAT'S THE ONLY TIME IN WHICH THE BY-SITE DEFINITION IS ELIMINATED FROM THE TEF GENERATOR OR THE DEFINITION OF GENERATOR.

MR. LAUTANEN: AREN'T IN FACT SHIPS ISSUED EPA

GENERATOR NUMBERS?

MR. AUSTIN: YES, THEY ARE.

MR. LAUTANEN: NAVY SHIPS.

MR. AUSTIN: YES, THEY ARE. BY CALIFORNIA AND BY THE FEDERAL EPA. TO DO OTHERWISE WOULD MEAN THAT ANYONE WHO GENERATED WASTE IN CALIFORNIA COULD PASS ON THE GENERATOR RESPONSIBILITY TO ANY SUBCONTRACTOR THAT HE WANTED TO.

TO DRAW AN ANALOGY, I HAVE A TANK ON MY SITE WHICH NEEDS TO BE CLEANED PERIODICALLY. IF I COULD PASS ON GENERATOR RESPONSIBILITY FOR THE TAXES BY HIRING A SUBCONTRACTOR TO COME ON AND CLEAN THEM, WHICH I DO, I WOULD HAVE NO HAZARDOUS WASTE. I WOULD PASS ALL THAT ON TO THE CONTRACTOR. BUT I CAN'T DO THA BECAUSE THE SUBCONTRACTOR IS NOT BY SITE AS REQUIRED UNDER THE DEFINITION OF GENERATOR, EVEN THOUGH HE COMES ONTO MY SITE TO WORK, JUST THE WAY WE GO ONTO A NAVY SHIP TO WORK.

MR. MAHONEY: JUST A COUPLE OF COMMENTS. I DON'T THINK BY SITE, AT NO POINT DOES IT EVER REFER TO OWNERSHIP OF THE SITE. IT REFERS TO PRODUCTION OF WASTE AT THE SITE, HAZARDOUS -- THE GENERATOR FEE IS CALCULATED BASED ON WASTE -- ON FINDINGS OF WASTE PRODUCED AT THE SITE. AND THAT'S WHY IT WAS NECESSARY FOR THAT DEFINITION TO USE THE TERM "BY SITE," TO CLARIFY THAT, YOU KNOW, IF YOU PRODUCE A VOLUME OF HAZARDOUS WASTE AT ONE SITE AND A VOLUME OF HAZARDOUS WASTE AT A DIFFEREN SITE, YOU CAN'T COMBINE THOSE TWO QUANTITIES TO COME UP WITH TH TOTAL FOR PURPOSES OF THE GENERATOR FEE. BUT IT DOESN'T REFER

TO OWNERSHIP.

AND I BELIEVE I DON'T HAVE TOO MUCH FURTHER TO SAY.

YOU KNOW, I THINK OUR POSITION IS SIMPLY THAT INTRODUCING IT INTO REGULATION, MAKING IT SUBJECT TO REGULATION IS NOT THE SAME THING AS PRODUCING IT. AND IF IT WERE, THEN ONE HALF OF THE TITLE 22 REGULATION WOULD BE SURPLUSAGE. I THINK THAT'S ALL WE HAVE AT THIS POINT. I WOULD HAVE ONE REQUEST. I WOULD LIKE TO CHECK TO SEE IF THERE IS ANY MORE BASIS FOR THE 50 PERCENT FIGURE. I DON'T KNOW IF THERE IS OR NOT. THE ONLY WAY I'M AWARE OF IS WE TOOK IT FROM THE AUDITOR'S REPORT. I THINK IF THERE IS ANYTHING MORE, WE COULD DO IT REALLY QUICKLY, SAY PERHAPS WITHIN A WEEK. COULD WE SAY IF YOU HAVEN'T HEARD FROM US IN A WEEK, THERE WAS NO FURTHER BASIS OTHER THAN WHAT'S IN THE REPORT?

MR. COHEN: OKAY. THE REASON I BROUGHT THAT UP, IT SOUNDED LIKE THESE NUMBERS ARE KIND OF COMING OUT OF THE AIR. AND MAYBE THAT'S THE ONLY PLACE WHERE YOU CAN GET THEM.

MR. LAUTANEN: I GUESS I HAVE -- THE NUMBERS ARE WHAT THEY ARE. OBVIOUSLY WE HAVE NO OBJECTION TO GETTING A BETTER HANDLE ON WHAT THEY ARE.

CONCEPTUALLY I WANT TO MAKE SURE I UNDERSTAND THE FLOW, IF YOU WILL. THERE'S WASTE ON THE SHIP, WATER IS INTRODUCED SO THAT YOU HAVE A MIX OF WASTE AND WATER. THEN THE WASTE AND WATER MIX COMES OFF AND THEN THE QUESTION IS IS 50 PERCENT OF WHAT COMES OFF PRODUCED ON THE SHIP OR IS 10 PERCENT

OF WHAT COMES OFF PRODUCED ON THE SHIP. I THINK THAT PUSHING THAT ANALYSIS THROUGH TO THE FINAL STAGE IS WHEN THAT 100 PERCENT COMES OFF, THE WATER IS NOT MANIFESTED. THE WATER IS IN THE MIDDLE AND PUMPED OFF.

MR. COHEN: IT SEEMS TO ME THE ONLY PURPOSE OF EVEN RAISING THIS IS TO SHOW THAT SOUTHWEST IS ACTUALLY CONTRIBUTING TO THE MATERIAL THAT'S BEING PUMPED OUT OF THE SHIP.

MR. LAUTANEN: RIGHT. BUT IF THE WATER THAT'S GOING ON IS WATER COMING OFF ON WHICH THERE'S NO TAX PAID, THEN 100 PERCENT OF THE WASTE THAT'S BEING MANIFESTED IS PRODUCED ON THE SHIP. IN OTHER WORDS, THE BASIS OF THE TAX IS NOT --

MR. COHEN: THE WATER.

MR. LAUTANEN: -- THE WATER STREAM COMING OFF. IT'S THE WATER STREAM AFTER IT'S SETTLED OUT.

MR. COHEN: THE WATER STREAM HAS ONLY TO DO WITH TYING SOUTHWEST INTO --

MR. LAUTANEN: RIGHT. SO I'M NOT SURE THE 90/10, 50/50 ALLOCATION IS RELEVANT.

MR. COHEN: YOU'RE A STEP AHEAD OF ME. I JUST REACHED THAT CONCLUSION.

MR. MAHONEY: I DON'T THINK IT'S RELEVANT.

MR. COHEN: I DON'T THINK IT'S RELEVANT SINCE YOU'RE NOT TAXING IT, IT'S NOT BEING TAXED ANYWAY. I WAS LOOKING AT IS THIS PART OF WHAT'S BEEN TAXED.

UNLESS ANYBODY HAS MORE TO SAY, IF I HAVE

QUESTIONS, I WILL COMMUNICATE WITH YOU. OTHERWISE THE REPORTS ARE GENERALLY OUT 60 TO 90 DAYS FROM NOW. THERE ARE SITUATIONS THAT COME UP WHERE THAT'S NOT TRUE. BUT THAT'S THE BASIC GOAL OF A HEARING.

STATE OF CALIFORNIA)
: SS.
COUNTY OF SAN DIEGO)

I, Jane A. Bramblett, A CERTIFIED SHORTHAND REPORTER, FOR THE STATE OF CALIFORNIA, DO HEREBY CERTIFY:

THAT I REPORTED STENOGRAPHICALLY THE PROCEEDINGS HAD AND TESTIMONY ADDUCED AT THE PROCEEDINGS HELD IN THE FOREGOING MATTER ON THE 16TH DAY OF April, 1992; THAT MY STENOTYPE NOTES WERE LATER TRANSCRIBED INTO TYPEWRITING UNDER MY DIRECTION, AND THE FOREGOING 38 PAGES CONTAIN A TRUE AND COMPLETE RECORD OF THE PROCEEDINGS HAD AND TESTIMONY ADDUCED AT SAID HEARING.

DATED AT SAN DIEGO, CALIFORNIA, ON THE 5TH DAY OF May, 1992

Jane A. Bramblett
CERTIFIED SHORTHAND REPORTER
CSR NO. 7574

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
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JUN 22 1992

June 17, 1992

Mr. Robert White
Assistant General Counsel
Southwest Marine, Inc.
P.O. Box 13308
San Diego, CA 92170-0308

Dear Mr. White:

Re: HG HQ 36 019852-010, -001

Enclosed is a copy of the Decision and Recommendation pertaining to the above-referenced petition for redetermination and claim for refund. I have recommended that the petition and the claim be denied.

Please read the Decision and Recommendation carefully. If you accept the decision, no further action is necessary. If you disagree with the decision, you have the following two options.

REQUEST FOR RECONSIDERATION. If you have new evidence and/or contentions not previously considered, you should file a Request for Reconsideration. Any such request must be sent to me within 30 days from the date of this letter, at the post office box listed above, with a copy to the Administrator, Special Taxes Division, at the same box number. No special form is required, but the request must clearly set forth any new contentions, and any new evidence must be attached.

BOARD HEARING. If you have no new evidence and/or contentions, but wish to have an oral hearing before the Board, a written request must be filed within 30 days from the date of this letter with Ms. Janice Masterton, Assistant to the Executive Director, at the above post office box.

If neither a request for Board hearing nor a Request for Reconsideration is received within thirty (30)

days from the date of this letter, the Decision and Recommendation will be presented to the Board for final consideration and action. Official notice of the Board's action will then be mailed to you.

Sincerely,

H. L. Cohen
Senior Staff Counsel

HLC:ct
Enclosure

cc: Mr. W. A. Lautanen
Attorney at Law
Gray, Cary, Ames & Frye
401 B Street, #1700
San Diego, CA 92101-4297
(w/enclosure)

Ms. Joan Markoff
Staff Attorney
Toxics Legal Office
Dept. of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806
(w/enclosure)

Ms. Jo Nelson
Dept. of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806
(w/enclosure)

Mr. James R. Cutright
Acting Chief Counsel
Dept. of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806
(w/enclosure)

Ms. Janice Masterton
Assistant to the Executive Director (w/enclosure)

Mr. Glenn Bystrom
Principal Tax Auditor (file attached)

Special Taxes Division - Administrator (w/enclosure)

(cc's continued on next page)

cc: (Cont'd)

J. Vining

J. Saunders

C. Spencer-Ayres

R. Frank

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matters of the Petition for Redetermination and the Claim for Refund Under the Hazardous Substances Tax Law of:	)	DECISION AND RECOMMENDATION
SOUTHWEST MARINE, INC.	)	Nos. HG HQ 36 019852-010 (Petition) HG HQ 36 019852-001 (Claim)
Petitioner/Claimant	)	

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel H. L. Cohen on April 16, 1992 in San Diego, California.

Appearing for Petitioner/ Claimant (hereinafter Petitioner):

Mr. Robert White
Assistant General Counsel

Mr. W. A. Lautanen
Attorney at Law

Ms. L. Merrill
Attorney at Law

Mr. D. Austin
Industrial Environmental Manager

Ms. J. Bramblett
Certified Shorthand Reporter

Appearing for the Department of Toxic Substances Control (DTSC):

Mr. D. Mahoney
Senior Staff Counsel

a co-generator because petitioner first causes the waste to be subject to regulation. The Navy is a generator because it is the owner of the vessels which produce the hazardous waste. DTSC points out that the hazardous waste in question is not produced on the ships but on petitioner's dock. The residue generated in the separation process constitutes a new waste stream. Petitioner, as the operator of the treatment unit, is the generator of this new stream of hazardous waste. The fact that the waste was manifested under petitioner's identification number also makes petitioner liable for the generator fee. As co-generators, petitioner and the Navy may contract between themselves as to who should be responsible for handling hazardous waste. However, DTSC may pursue either for payment of fees.

DTSC argues that the Diamond National case is inapplicable here. It dealt with sales tax, not a fee. Further, the incidence of the fee here is on petitioner, not on the U.S.

Analysis and Conclusions

Section 25205.5 of the Health and Safety Code imposes an annual fee on every generator of hazardous waste. There are seven categories of fees which are based on the total amount of hazardous waste generated. The highest fee category is for generators who generate more than 2,000 tons of hazardous waste during the prior calendar year. The lowest fee category is for generators who generate at least five tons, but less than 25 tons. Petitioner contends that the fee category applicable to its operation is the lowest category. DTSC contends that it is the highest category. The fee for the highest category was 200 times the fee for the lowest category in the period in question.

Section 66078 (now Section 66260.10) of Title 22 of the California Code of Regulations provides that "generator" means any person by site whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation. It is obvious that California law can apply only to acts occurring within California. Even if the hazardous waste in question here is generated aboard a Naval vessel and that vessel was subject to regulation, it was subject to federal regulation, not California regulation. "The first act making the hazardous waste subject to California regulation was the treatment of the waste by petitioner within California." Further, the waste to which the fees are being applied here is not the hazardous waste coming off the Naval vessel. It is the hazardous waste coming out of petitioner's treatment

equipment. Petitioner's distinction between transport vessels and other vessels has no application here.

As a further basis for applying the fees, petitioner, not the Navy, shipped the hazardous waste under hazardous waste manifests. Petitioner signed the hazardous waste manifests as the generator. The transporter had no authority to validate the disclaimers made by petitioner. Absent unusual circumstances, a person who ships hazardous waste under a hazardous waste manifest is regarded as the generator of the hazardous waste.

Petitioner's reliance on the Diamond National case is misplaced. That case deals with the sales tax which was passed directly to the U.S. Government in the form of a billing for sales tax reimbursement. Here, there is no tax passed through directly to the United States Government as a separate billing. It is a fee, not a tax, and it is applied by category to petitioner. There is no way that petitioner could itemize the billing to pass through the fee to the Navy.

The fee in question is merely a cost of doing business and the fact that this may increase the cost to the United States is not legally significant. In United States v. New Mexico, 455 U.S. 720 and Washington v. United States, 460 U.S. 536 cases, the Supreme Court states that immunity from state taxation may not be conferred on a third party simply because the tax has an effect on the United States or even because the Federal Government shoulders the entire economic burden. As long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory.

Petitioner would further argue, if given the opportunity, that its property tax and income tax also increase the cost to the United States and therefore claim an exemption. The generator fee, just like the property and income taxes, are just another cost of doing business. The argument of passing on tne higher cost to the government was rejected by the Supreme Court in Gurley v. Rhoden (1975) 421 U.S. 200, 211. The high court stated that the tax in question was no different than other costs incurred in bringing the product to market, including the cost of raw material, its processing and delivery.

Recommendation

Deny the petition and the claim.

H. L. Cohen

H. L. Cohen, Senior Staff Counsel

5-28-92
Date

JA

GRAY, CARY, AMES & FRYE

GORDON GRAY (1877-1967)
W. P. CARY (1882-1943)
WALTER AMES (1893-1980)
FRANK A. FRYE (1904-1970)

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OTHER OFFICES
IN
EL CENTRO
ESCONDIDO
LA JOLLA

July 16, 1992

U.S. EXPRESS MAIL

H. L. Cohen, Esq.
Senior Staff Counsel
State Board of Equalization
P. O. Box 942879
Sacramento, California 94279-0001

Re: Southwest Marine, Inc.
P. O. Box 13308
San Diego, CA 92113
Account No. HG HQ 36-019852-001, -010
Notice of Determination - Hazardous Substances Tax Law (Generator Fee)

Dear Mr. Cohen:

This letter constitutes a Request for Reconsideration by Southwest Marine, Inc. ("Southwest") with respect to your Decision and Recommendation dated May 28, 1992 (the "Decision") in the above-referenced matter. We believe a Request for Reconsideration is appropriate because your Decision is based, in large part, on your conclusion that hazardous waste generated aboard a Navy vessel is subject to federal regulation, not California regulation. The question of federal versus state jurisdiction was not an issue raised or discussed in the papers previously filed or at the hearing. Thus, our new contention is that, under applicable legislation, Naval vessels are subject to state regulation. In addition, we also believe a Request for Reconsideration is appropriate to allow us to present additional authority on the question of when a particular material constitutes "hazardous waste."

1. The State of California Clearly Has Jurisdiction Over U.S. Navy Vessels.

Section 6961 of Title 42 of the United States Code, a copy of which is attached as Exhibit A, requires that all federal facilities (including Navy ships) comply with all state and local requirements with respect to the disposal of hazardous

waste. Thus, Navy ships generating hazardous waste in California are clearly subject to California regulatory jurisdiction.

Not all waste produced on these ships is produced outside the waters of the State. As pointed out at the hearing, the waste in question is generated during operation of the vessels in question in California waters and while docked at San Diego Naval facilities. See pages 7-8 of the Transcript of Proceedings, copies of which are attached as Exhibit B.

2. Additional Authority Not Previously Considered Demonstrates that the Material in Question Is "Hazardous Waste" Prior to Removal by Petitioner.

At the hearing, we offered to work through the definition of "waste" contained in the applicable California regulations. See page 13 of the Transcript of Proceedings, a copy of which is attached as Exhibit C. This definition is important because we believe hazardous material is subject to California regulation as soon as it becomes "waste" within the meaning of the California regulations or, if it became "waste" outside of the State's jurisdiction (for example, on the high seas), as soon as it enters the State.

California Regulation Section 22-66261.2(a), a copy of which is attached as Exhibit D, defines "waste" as any "discarded" material. Section 22-66261.2(b)(1), in turn, defines a "discarded" material as any material "relinquished" as explained in Section 22-66261.2(c). Finally, Section 22-66261.2(c)(3) defines "relinquished" material as any material "accumulated before being disposed of."

These definitions directly apply to the waste generated on Navy ships. The materials removed by petitioner clearly constitute "hazardous waste" prior to removal by petitioner.

We appreciate the opportunity to present this additional material offered to be presented at the hearing.

* * *

In summary, we believe the issues of (1) state versus federal jurisdiction and (2) the definition of "hazardous waste" under applicable California regulations are contentions not previously addressed. We believe these contentions mandate a finding in favor of petitioner.

For the reasons stated above, Southwest respectfully requests reconsideration of the Decision.

Very truly yours,

W. Alan Lautanen
For
GRAY, CARY, AMES & FRYE

WAL:278:lmc
20265521
Enclosures
cc: Robert A. White, Esq.
Mr. Dana M. Austin
Administrator, Special Taxes Division, State Board of Equalization (with enclosures)
John J. Lormon, Esq.
Lisa C. Merrill, Esq.

CORPORATE HEADQUARTERS
Foot of Sampson Street • P.O. Box 13308 • San Diego • California • 92170-0308
(619) 238-1000 • TWX: 910-335-1167 SWM SDG • FAX (619) 238-0934

SOUTH WEST MARINE INC.

MEMORANDUM

TO: Bob White

FROM: Dana Austin 1014

DATE: June 25, 1992

SUBJECT: Denial of petition by SBE on refund of Haz-Waste taxes

I have reviewed the Decision and Recommendation from the State Board of Equalization (SBE) concerning Southwest Marine's petition for a refund for hazardous waste taxes paid on Navy hazardous waste. Our petition was denied based on the SBE's assumption that SWM was the generator of the waste, not the Navy.

The SBE, in it's decision states, in pertinent part:

> "Even if the hazardous waste in question here is generated aboard a Naval vessel and that vessel was subject to regulation, it was subject to federal regulation, not California regulation. The first act making the hazardous waste subject to California regulation was the treatment of the waste by petitioner within California."

The SBE's reasoning here is mistaken for the following reason. 42 USC, Section 6961 (attached) specifically requires federal facilities to be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural in the disposal or management of solid waste or hazardous waste. Therefore the hazardous waste generated on Navy vessels in California waters is subject to California hazardous waste control laws and regulations, prior to exiting the vessel and being treated by the contractor, Southwest Marine.

The second statement by the SBE above is also incorrect. The act making the hazardous waste subject to California regulation was not the treatment of the waste by Southwest Marine but the Navy's act of contracting for the disposal of the waste by Southwest Marine, or contracting with any other party for that matter.

For any material to be subject to the California hazardous waste control laws or regulations it must meet both the following criteria:

1) It must be a waste, as defined in 26 CCR 22-66261.2. Definition of Waste; (attached) and,

2) It must be hazardous, as defined in 26 CCR 22-66261.3. Definition of Hazardous Waste (attached).

In the case of the latter, it is clear that oily-water, tank sludges, asbestos, solvents, paint wastes, PCBs and the other types of materials which the Navy contracts to SWM to remove and dispose of, are hazardous as defined in Section 22-66262.3. Neither SWM, the SBE nor the California Division of Toxic Substance Control (DTSC) dispute this fact.

The question as to who first causes the material to be subject to the hazardous waste regulations, and is therefore the generator, is determined by when the material meets the definition of a waste as defined in Section 22-66261.2. The definition of waste as defined in Section 22-66261.2. is, in pertinent part, "..any discarded material of any form.." Discarded material is defined as any of the following: 1) relinquished, 2) recycled or 3) inherently waste-like.

The Navy by the act of contracting to dispose of hazardous materials is relinquishing the material, hereby defining the material as a waste as provided in Section 22-66262.3. This act, by the Navy, makes the material subject to the California hazardous waste regulations prior to any action by Southwest Marine.

RECOMMENDATION: The finding by the SBE Hearing Officer is clearly erroneous, both in point of authority and interpretation. The decision should be appealed.

cc: Lloyd Schwartz
Alan Lautanen

whether to establish the same or similar policies or impose the same or similar monitoring or other controls on virgin materials.

(Pub.L. 89–272, Title II, § 5005, as added Pub.L. 96–482, § 21(c)(1), Oct. 21, 1980, 94 Stat. 2346.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 96–482, see 1980 U.S. Code Cong. and Adm.News, p. 5019.

§ 6956. Authorization of appropriations

There are authorized to be appropriated to the Secretary of Commerce $5,000,000 for each of fiscal years 1980, 1981, and 1982 to carry out the purposes of this subchapter.

(Pub.L. 89–272, Title II, § 5006, as added Pub.L. 96–482, § 31(f)(1), Oct. 21, 1980, 94 Stat. 2353.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 96–482, see 1980 U.S. Code Cong. and Adm.News, p. 5019.

SUBCHAPTER VI—FEDERAL RESPONSIBILITIES

§ 6961. Application of Federal, State, and local law to Federal facilities

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year

(c) A material is a waste if it is relinquished by being any of the following:

(1) disposed of;

(2) burned or incinerated;

(3) accumulated, stored or treated, but not recycled, before or in lieu of being relinquished by being disposed of, burned or incinerated.

(d) A material is a waste if it is recycled, or accumulated, stored or treated before recycling, by being managed:

(1) through being used in a manner constituting disposal:

(A) materials noted with an "*" in column 1 of Table I are wastes when they are:

1. applied to or placed on the land in a manner that constitutes disposal; or

2. used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself is a waste);

(B) however, commercial chemical materials listed in section 66261.33, which are discarded commercial chemical products, off-specification species, container residues, or spill residues thereof, and which are applied to the land and application to the land is their ordinary manner of use are non-RCRA hazardous wastes. Commercial chemical products which are "retrograde materials" as defined in section 66260.10 are not wastes until they become "recyclable materials" pursuant to subsection (c) of the definition of "recyclable materials" in section 66260.10;

(2) through being burned for energy recovery:

(A) materials noted with an "*" in column 2 of Table 1 are wastes when they are:

1. burned to recover energy;

2. used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself is a waste);

(B) however, commercial chemical materials listed in section 66261.33, which are discarded commercial chemical products, off-specification species, container residues, or spill residues thereof, and which are fuels are non-RCRA hazardous wastes. Commercial chemical products which are "retrograde materials" as defined in section 66260.10 are not wastes until they become "recyclable materials" pursuant to subsection (c) of the definition of "recyclable materials" in section 66260.10;

(3) through being reclaimed: materials noted with an "*" or "**" in column 3 of Table 1 are wastes when reclaimed;

(4) through being accumulated speculatively: materials noted with an "*" or "**" in column 4 of Table 1 are wastes when accumulated speculatively.

TABLE 1

Column	*Use Constituting Disposal 66261.2(d)(1)* (1)	*Energy Recovery/Fuel 66261.2(d)(2)* (2)	*Reclamation 66261.2(d)(3)* (3)	*Speculative Accumulation 66261.2(d)(4)* (4)
Spent Materials	*	*	*	*
Sludges (listed in section 66261.31 or 66261.32)	*	*	*	*
Sludges exhibiting a characteristic of hazardous waste	*	*	**	*
By–products (listed in section 66261.31 or 66261.32)	*	*	*	*
By–products exhibiting a characteristic of hazardous waste	*	*	**	*
Commercial chemical products (listed in section 66261.33)	*	*	**	**

Note: The terms "spent materials," "sludges," and "by–products" are defined in section 66260.10.

* Except as provided in sections 66261.2(d)(1)(B) and 66261.2(d)(2)(B), a material designated by a single asterisk in Column (1), (2), (3), or (4) is a waste which is not eligible to be classified as a non–RCRA hazardous waste.

** Unless exempt pursuant to Health and Safety Code section 25143.2(d), a material designated with a double asterisk in Column (3) or (4) which is identified as a hazardous waste pursuant to section 66261.3 is a non–RCRA hazardous waste. Commercial chemical products which are "retrograde materials" as defined in section 66260.10 are not wastes until they become "recyclable materials" pursuant to subsection (e) of the definition of "recyclable materials" in section 66260.10.

(e) A material is a waste if it is inherently waste–like when it is recycled. The following materials are wastes when they are recycled: hazardous Waste Nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026 and F028.

(f) A material is a waste if it poses a threat to human health or the environment and meets either, or both, of the following:

(1) it is mislabeled or not adequately labeled, unless the material is correctly labeled or adequately labeled within 10 days after the material is discovered to be mislabeled or inadequately labeled;

(2) it is packaged in deteriorated or damaged containers, unless the material is contained in sound or undamaged containers within 96 hours after the containers are discovered to be deteriorated or damaged.

Note: Authority cited: Sections 208, 25141, 25150, and 25159, Health and Safety Code. Reference: Sections 25120.5, 25121, 25124, 25143.2, 25159 and 25159.5, Health and Safety Code and 40 CFR Section 261.2.

History

1. New section filed 5–24–91; effective 7–1–91 (Register 91, No. 22).

§ 22–66261.3. Definition of Hazardous Waste.

(a) A waste, as defined in section 66261.2, is a hazardous waste if:

(1) it is not excluded from classification as a waste or a hazardous waste under Health and Safety Code section 25143.2(b) or 25143.2(d) or section 66261.4; and

(2) it meets any of the following criteria:

(A) it exhibits any of the characteristics of hazardous waste identified in article 3 of this chapter;

(B) it is listed in article 4 of this chapter and has not been excluded by the USEPA Administrator from 40 CFR Part 261 Subpart D pursuant to 40 CFR sections 260.20 and 260.22;

(C) it is listed in or contains a constituent listed in Appendix X to this chapter. However, the waste is not a hazardous waste if:

1. it is determined that the waste does not meet the criteria of subsection (a)(2)(B) of this section; and

2. it is determined that the waste does not meet the criteria of subsection (a)(2)(A) of this section by:

i. testing the waste according to the methods set forth in article 3 of this chapter, or according to an equivalent method approved by the Department pursuant to section 66260.21; or

ii. applying knowledge of the hazardous properties of the waste in light of the materials or the processes used and the characteristics set forth in article 3 of this chapter;

(D) it is a mixture of a hazardous waste that is listed in article 4 of this chapter other than a hazardous waste listed with hazard code (T) or (H), and another waste, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in article 3 of this chapter;

(E) it is a mixture of a waste and one or more hazardous wastes listed in article 4 of this chapter which has not been excluded by the USEPA Administrator from 40 CFR Part 261 Subpart D pursuant to 40 CFR sections 260.20 and 260.22. However, the following mixtures of wastes and hazardous wastes listed in article 4 of this chapter are not hazardous wastes (except by application of subsection (a)(2)(A) or (a)(2)(B) of this section) if the generator can demonstrate that the mixture consists of wastewater, the discharge of which is subject to regulation under either section 402 or section 307(b) of the Clean Water Act (including wastewater at facilities which have eliminated the discharge of wastewater), and:

1. one or more of the following spent solvents listed in section 66261.31 — carbon tetrachloride, tetrachloroethylene, trichoroethylene — provided, that the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 1 part per million; or

2. one or more of the following spent solvents listed in section 66261.31 — methylene chloride, 1,1,1–trichloroethane, chlorobenzene, o–dichlorobenzene, cresols, cresylic acid, nitrobenzene, toluene, methyl ethyl ketone, carbon disulfide, isobutanol, pyridine, spent chlorofluorocarbon solvents — provided that the maximum total weekly usage of these solvents (other than the amounts that can be demonstrated not to be discharged to wastewater) divided by the average weekly flow of wastewater into the headworks of the facility's wastewater treatment or pretreatment system does not exceed 25 parts per million; or

3. heat exchanger bundle cleaning sludge from the petroleum refining industry (EPA Hazardous Waste No. K050); or

4. a discarded commercial chemical product, or chemical intermediate listed in section 66261.33 arising from "de minimis" losses of these materials from manufacturing operations in which these materials are used as raw materials or are produced in the manufacturing process. For purposes of this subsection, "de minimis" losses include those from normal material handling operations (e.g., spills from the unloading or transfer of materials from bins or other containers, leaks from pipes, valves or other devices used to transfer materials); minor leaks of process equipment, storage tanks or containers; leaks from well–maintained pump packings and seals; sample purgings; relief device discharges; discharges from safety showers and rinsing and cleaning of personal safety equipment; and rinsate from empty containers or from containers that are rendered empty by that rinsing; or

5. wastewater resulting from laboratory operations containing toxic (T) wastes listed in article 4 of this chapter, provided that the annualized average flow of laboratory wastewater does not exceed one percent of total wastewater flow into the headworks of the facility's wastewater treatment or pretreatment system, or provided the wastes, combined annualized average concentration does not exceed one part per million in the headworks of facility's wastewater treatment or pretreatment facility. Toxic (T) wastes used in laboratories that are demonstrated not to be discharged to wastewater are not to be included in this calculation;

(F) it is not classified as a hazardous waste by application of the criteria in subsections (a)(2)(A) through (a)(2)(E) of this section, but has been classified as a hazardous waste by the Department because it otherwise conforms to the definition of hazardous waste set forth in Health and Safety Code section 25117.

(b) A waste which is not excluded from classification as a waste or hazardous waste under the provisions of section 66261.4(b) or Health and Safety Code section 25143.2(b) or 25143.2(d) becomes a hazardous waste when any of the following events occur:

(1) in the case of a waste listed in article 4 of this chapter, when the waste first meets the listing description set forth in article 4 of this chapter;

(2) in the case of a mixture of waste and one or more hazardous wastes listed in article 4 of this chapter, when the hazardous waste listed in article 4 of this chapter is first added to the waste.

(3) In the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in article 3 of this chapter.

(c)(1) A hazardous waste will remain a hazardous waste unless and until it meets the criteria of subsection (d) of this section. Except as otherwise provided in subsection (c)(2) of this section, any waste generated from the treatment, storage, or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate including precipitation run–off is a hazardous waste. (However, materials that are reclaimed from wastes and that are used beneficially are not wastes and hence are not hazardous wastes under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.)

(c)(2) Waste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry (SIC Codes 331 and 332) is not hazardous even though it is generated from the treatment, storage, or disposal of a hazardous waste, unless it exhibits one or more of the characteristics of hazardous waste.

(d) Except as provided in subsection (c) of this section, any waste described in subsection (c) of this section is not a hazardous waste if it meets both of the following criteria:

(1) the waste does not exhibit any of the characteristics of hazardous waste identified in article 3 of this chapter; and

(2) in the case of a waste which is a waste listed in article 4 of this chapter, contains a waste listed under article 4 of this chapter or is derived from a waste listed in article 4 of this chapter (but not including precipitation run off), the waste also has been excluded by the USEPA Administrator from the lists of hazardous wastes in 40 CFR Part 261 Subpart D pursuant to 40 CFR sections 260.20 and 260.22.

NOTE: Authority cited: Sections 208, 25141, 25150 and 25159, Health and Safety Code. Reference: Sections 25117, 25141, 25159 and 25159.5, Health and Safety Code and 40 CFR Section 261.3.

HISTORY

1. New section filed 5–24–91; effective 7–1–91 (Register 91, No. 22).

§ 22–66261.4. Exclusions.

(a) Materials which are not wastes. The following materials are not wastes for the purpose of this chapter:

(1) industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the federal Clean Water Act, as amended (33 U.S.C. section 1342). This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment;

(2) source, special nuclear or by–product material as defined by the federal Atomic Energy Act of 1954, as amended, (42 U.S.C. section 2011 et seq);

(3) spent sulfuric acid used to produce virgin sulfuric acid, unless it is accumulated speculatively as defined in section 66260.10.

(b) Wastes which are not hazardous wastes. The following wastes are not hazardous wastes:

(1) infectious waste which consists solely of the carcasses of animals, which is not otherwise hazardous, and which is handled, stored and disposed of according to all applicable requirements established by the Department of Food and Agriculture pursuant to provisions of chapter 1, part 1, division 5 (commencing with section 9101) and of chapter 5, part 3, division 9 (commencing with section 19200) of the Food and Agricultural Code;

(2) materials which are exempted or excluded from classification as solid waste or hazardous waste pursuant to 40 CFR section 261.4 if they do not exhibit a characteristic of a hazardous waste as set forth in article 3 of this chapter;

(c) hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non–waste–treatment–manufacturing unit, is not subject to regulation under this division or to the notification requirements of Health and Safety Code section 25153.6 until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials;

(d) samples;

(1) except as provided in subsection (d)(2) of this section, a sample of solid waste or a sample of water, soil, or air, which is collected for the sole purpose of testing to determine its characteristics or composition, is not subject to any requirements of this division or to the notification requirements of Health and Safety Code section 25153.6 when:

HISTORICAL AND STATUTORY NOTES

1984 Amendment

Pub.L. 98–616 authorized appropriation of $1,500,000 for each of the fiscal years 1985 through 1988.

Legislative History

For legislative history and purpose of Pub.L. 98–616, see 1984 U.S. Code Cong. and Adm. News, p. 5576.

SUBCHAPTER VI—FEDERAL RESPONSIBILITIES

§ 6961. Application of Federal, State, and local law to Federal facilities

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12780

Oct. 31, 1991, 56 F.R. 56289

FEDERAL AGENCY RECYCLING AND THE COUNCIL ON FEDERAL RECYCLING AND PROCUREMENT POLICY

WHEREAS, this Administration is determined to secure for future generations of Americans their rightful share of our Nation's natural resources, as well as a clean and healthful environment in which to enjoy them; and

WHEREAS, two goals of this Administration's environmental policy, cost-effective pollution prevention and the conservation of natural resources, can be significantly advanced by reducing waste and recycling the resources used by this generation of Americans; and

WHEREAS, the Federal Government, as one of the Nation's largest generators of solid waste is able through cost-effective waste reduction and recycling resources to conserve local government disposal capacity; and

WHEREAS, the Federal Government, as the Nation's largest single consumer, is able through affirmative procurement practices to encourage the development of economically efficient markets for products manufactured with recycled materials;

NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Solid Waste Disposal Act, Public Law 89–272, 79 Stat. 997, as amended by the Resource Conservation and Recovery Act ("RCRA"), Public Law 94–580, 90 Stat. 2795 (1976) [this chapter], hereby order as follows:

PART 1—PREAMBLE

Section 101. The purpose of this Executive order is to:

(a) Require that Federal agencies promote cost-effective waste reduction and recycling of reusable materials from wastes generated by Federal Government activities.

(b) Encourage economically efficient market demand for designated items produced using recovered materials by directing the immediate implementation of cost-effective Federal procurement preference programs favoring the purchase of such items.

(c) Provide a forum for the development and study of policy options and procurement practices that will promote environmentally sound and economically efficient waste reduction and recycling of our Nation's resources.

(d) Integrate cost-effective waste reduction and recycling programs into all Federal agency waste management programs in order to assist in addressing the Nation's solid waste disposal problems.

(e) Establish Federal Government leadership in addressing the need for efficient State and local solid waste management through implementation of environmentally sound and economically efficient recycling.

Sec. 102. Consistent with section 6002(c)(1) of RCRA (42 U.S.C. 6962(c)(1)) [section 6962(c)(1) of this title], activities and operations of the executive branch shall be conducted in an environmentally responsible manner, and waste reduction and recycling opportunities shall be utilized to the maximum extent practicable, consistent with economic efficiency.

Sec. 103. Consistent with section 6002(c)(2) of RCRA (42 U.S.C. 6962(c)(2)) [section 6962(c)(2) of this title], agencies that generate energy from fossil fuel in systems that have the technical capacity of using energy or fuels derived from solid waste as a primary or supplementary fuel shall use such capability to the maximum extent practicable.

PART 2—DEFINITIONS

For purposes of this order:

Sec. 201. "Federal agency" means any department, agency, or other instrumentality of the executive branch.

Sec. 202. "Procurement" and "acquisition" are used interchangeably to refer to the processes through which Federal agencies purchase products.

Sec. 203. "Recovered materials" is used as defined in section 1004(19) and 6002(h) of the Resource Conservation and Recovery Act (42 U.S.C. 6903(19) and 6962(h)) [sections 6903(19) and 6962(h) of this title], as amended.

Sec. 204. "Recycling" means the diversion of materials from the solid waste stream and the beneficial use of such materials. Recycling is further defined as the result of a series of activities by which materials that would become or otherwise remain waste, are diverted from the solid waste stream by collection, separation and processing and are used as raw materials in the manufacture of goods sold or distributed in commerce or the reuse of such materials as substitutes for goods made of virgin materials.

Sec. 205. "Waste reduction" means any change in a process, operation, or activity that results in the economically efficient reduction in waste material per unit of production without reducing the value output of the process, operation, or activity, taking into account the health and environmental consequences of such change.

PART 3—SOLID WASTE RECYCLING PROGRAMS

Sec. 301. Recycling Programs. Each Federal agency that has not already done so shall initiate a program to promote cost-effective waste reduction and recycling of reusable materials in all of its operations and facilities. These programs shall foster (a) practices that reduce waste generation, and (b) the recycling of recyclable materials such as paper, plastic, metals, glass, used oil, lead acid batteries, and tires and the composting of organic materials such as yard waste. The recycling programs implemented pursuant to this section must be compatible with applicable State and local recycling requirements.

Sec. 302. Contractor Operated Facilities. Every contract that provides for contractor operation of a Government-owned or leased facility, awarded more than 210 days after the effective date of this Executive order, shall include provisions that obligate the contractor to comply with the requirements of this Part as fully as though the contractor were a Federal agency.

PART 4—VOLUNTARY STANDARDS

Sec. 401. Amendment of OMB Circular No. A–119. The Director of the Office of Management and Budget ("OMB") shall amend, as appropriate, OMB Circular No. A–119, "Federal Participation in the Development and Use of Voluntary Standards," to encourage Federal agencies to participate in the development of environmentally sound and economically efficient standards and to encourage Federal agency use of such standards.

PART 5—PROCUREMENT OF RECOVERED MATERIALS

Sec. 501. Adoption of Affirmative Procurement Programs. Within 180 days after the effective date of this order, each Federal agency shall provide a report to the Administrator of the Environmental Protection Agency regarding the Agency's adoption of an affirmative procurement program; such programs are required by section 6002(i) of RCRA (42 U.S.C. 6962(i)) [section 6962(i) of this title]. Within 1 year of the issuance of this order, the Administrator of the Environmental Protection Agency shall report to the President regarding the compliance of each Federal agency with this requirement.

Sec. 502. Annual Review of Affirmative Procurement Programs. In accordance with section 6002(i) of RCRA (42 U.S.C. 6962(i)) [section 6962(i) of this title], each Federal agency shall review annually the effectiveness of its affirmative procurement program and shall provide a report regarding its findings to the Environmental Protection Agency and to the Office of Federal Procurement Policy, beginning with a report covering fiscal year 1992. Such report shall be transmitted by December 15 each year. Reports required by this section shall be made available to the public.

PART 6—RECYCLING CO… AND THE COUNCIL ON … CYCLING AND PROCUR… CY

Sec. 601. Federal Recycli… Within 90 days after the effect… order, the Administrator of the… Protection Agency shall designat… of that Agency to serve as the F… Coordinator. The Federal Recyc… shall review and report annually… time of agency budget submiss… taken by the agencies to comply … ments of this order.

Sec. 602. Designation of Re… tors. Within 90 days after th… this order, the head of each Fe… designate an agency employee … Recycling Coordinator. The … Coordinator shall be responsibl…

(a) coordinating the develope… agency waste reduction and … that complies with the compre… tation plan developed by the … Recycling and Procurement P…

(b) coordinating agency acti… fits, costs, and savings data … tiveness of the agency progra…

(c) coordinating the develo… ports required by this Executi… ing copies of such reports to… Protection Agency.

Sec. 603. The Council o… and Procurement Policy. (a… eral Recycling and Procurem… established. It shall compri… cling Coordinator, the Chai… on Environmental Quality, … the Office of Federal Procur… Agency Recycling Coordina… ment Executive of each of t… the Environmental Protecti… partment of Defense, the Ge… istration, the National Aero… ministration, the Departme… partment of Commerce, a… the Interior. The Federal … shall serve as Chair of the …

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(B) the development … to encourage active parti… efficient Federal waste … programs; and

(C) the development o… tive waste reduction st… Federal agencies;

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Hub v. U.S. Dept. of Energy,
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GRAY, CARY, AMES & FRYE

GORDON GRAY (1877-1967)
W. P. CARY (1882-1943)
WALTER AMES (1893-1980)
FRANK A. FRYE (1904-1970)

W. ALAN LAUTANEN
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401 B STREET, SUITE 1700
SAN DIEGO, CALIFORNIA 92101-4297
TELEPHONE (619) 699-2700
FAX (619) 236-1048

OTHER OFFICES
IN
EL CENTRO
ESCONDIDO
LA JOLLA

August 10, 1992

CERTIFIED/RETURN RECEIPT REQUESTED

Ms. Janice Masterton
Assistant to Executive Director
State Board of Equalization
1020 N Street
P. O. Box 942879
Sacramento, California 94279-0001

Re: Southwest Marine, Inc.
HG HQ 36-019852-001; -010
(Request for Oral Hearing)

Dear Ms. Masterton:

The purpose of this letter is to request an oral hearing before the full Board in the above-referenced matter. We request that the hearing be held at the Board offices in Torrance, California.

Very truly yours,

W. Alan Lautanen
For
GRAY, CARY, AMES & FRYE

WAL:lmc
20273298
cc: Robert A. White, Esq.
Mr. Dana M. Austin